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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, CHARLES J. SCHAFFER, JR.,
Petitioners,

v.

FUQUA INDUSTRIES, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "presumption of correctness" in 29 U.S.C. § 1401(a)(3)(A) constitutionally may be applied to require an employer to bear the burdens of production and persuasion on the issue of its intent to evade or avoid withdrawal liability in violation of 29 U.S.C. § 1392(c) in a civil case.

2. Whether a statutory withdrawal liability arbitrator under 29 U.S.C. § 1401 is bound to follow applicable law and find that Fuqua Industries, Inc. remained an "employer" under 29 U.S.C. § 1392(c) or other provisions based on:

(a) admitted prior control;

(b) the failure of the sole decisionmaker for Fuqua—J.B. Fuqua—to testify about the reasons for a sudden change of mind about divestiture with the advent of withdrawal liability under 29 U.S.C. § 1381 *et seq.*;

(c) the unexplained disappearance of all transactional files relating to the divestiture of Interstate Motor Freight System, a major interstate common carrier with annual revenues of nearly $200 Million;

(d) the unique and simultaneous divestiture of Fuqua's only other subsidiary with withdrawal liability, and

(e) admitted pretext in contemporaneous minutes in view of the presentation of new (and undocumented) reasons for the divestiture at trial.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Teamsters Pension Trust Fund of Philadelphia and Vicinity and Charles J. Schaffer, Jr., its administrator and a fiduciary charged with collection of withdrawal liability. The Teamsters Pension Trust Fund of Philadelphia and Vicinity is a trust under 29 U.S.C. § 186(c)(5) whose trustees sponsor a multiemployer plan and an employee pension benefit plan under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1002(2), (37)(A), 1301(a)(3).

The Respondent before this Court is Fuqua Industries, Inc. The status of any parent company, subsidiary or affiliate of Fuqua (within the meaning of Rule 29.1 of this Court) is not currently available to Petitioners.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	12
I. THE THIRD CIRCUIT HAS SPLIT WITH THIS COURT AND OTHER CIRCUITS IN OVERTURNING THE REBUTTABLE PRESUMPTION OF 29 U.S.C. § 1401(a)(3)(A) IN A CIVIL CASE	15
II. THE ISSUE IS VITALLY IMPORTANT AS THE THIRD CIRCUIT DECISION INVALIDATES THE PARALLEL PRESUMPTION OF CORRECTNESS APPLIED TO FEDERAL TAX ASSESSMENTS	17
CONCLUSION	18
APPENDIX:	
Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Fuqua Industries, Inc., Judgment Order, November 3, 1992 (3d Cir. No. 92-1340)	1a
Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Fuqua Industries, Inc., Order & Opinion, March 31, 1992 (E.D. Pa. Civ. No. 90-6872)	3a

TABLE OF CONTENTS—Continued

Page

Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Fuqua Industries, Inc., Merits Award & Opinion, October 1, 1990 (Jordan, Arb., AAA No. 14 621 0011 87J MEPPA) 20a

Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Fuqua Industries, Inc., Burden of Proof Award & Opinion, October 10, 1988 (Jordan, Arb., AAA No. 14 621 0011 87J MEPPA) 71a

Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Fuqua Industries, Inc., Order Sur Petition for Rehearing, December 3, 1992 (3d Cir., No. 92-1340) 80a

TABLE OF AUTHORITIES

CASES — Page

Anastasato v. Comm'r, 794 F.2d 884 (3d Cir. 1986) 17
Banner Industries -and- Central States, S.E. & S.W.A. Pension Fund, 11 (BNA) E.B.C. 1149 (Graham, Arb. 1989) 10
Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc., 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) 16
Botany Worsted Mills v. U.S., 278 U.S. 282 (1929) 17
Bowman Transportation v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974) 13
Chicago Truck Drivers Pension Fund v. Louis Zahn Drug Company, 890 F.2d 1405 (7th Cir. 1989) 13
Comm'r v. Tufts, 461 U.S. 300 (1983) 6
Concrete Pipe & Products of California, Inc. v. Laborers Pension Trust Fund for Southern California, No. 91-904 ..... 13, 18
Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia and Vicinity, 704 F. Supp. 1284 (D. Del. 1989) 2
Fuqua National, Inc. v. U.S., 334 F. Supp. 1116 (S.D. Ga. 1971) 10
Herculite Protective Fabrics Corp. v. Comm'r, 387 F.2d 475 (3d Cir. 1968) 18
Huber v. Casablanca Industries, 916 F.2d 85 (3d Cir. 1990), *cert. dismissed*, —— U.S. ——, 113 S.Ct. 1070 (1993) 12, 13
Keith Fulton and Sons, Inc. v. New England Teamsters and Trucking Industry Fund, 762 F.2d 1137 (1st Cir. 1985) (*en banc*) 15
Lavine v. Milne, 424 U.S. 577 (1976) 16
Mammoth Oil Co. v. U.S., 275 U.S. 13 (1927) 14
Marvin Hayes Lines, Inc. v. Central States S.E. & S.W. Areas Pension Fund, 814 F.2d 297 (6th Cir. 1987) 2

TABLE OF AUTHORITIES—Continued

	Page
Michigan Utd. Food & Commercial Workers Pension Fund v. Eberhard Foods, Inc., 831 F.2d 1258 (6th Cir. 1987)	16
PBGC v. Ouimet Corporation, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981)	7
PBGC v. R.A. Gray & Company, 467 U.S. 717 (1984)	7
PBGC v. Yahn & McDonnell, Inc., 481 U.S. 735 (1981)	12
Pepper v. Litton, 308 U.S. 295 (1939)	14
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)	14
Peaty v. U.S., 442 F.2d 1154 (3d Cir. 1971)	18
Republic Industries v. Teamsters Joint Council No. 83 of Va. Pension Fund, 718 F.2d 628 (4th Cir. 1983)	16
Rockwell v. Comm'r, 512 F.2d 882 (9th Cir. 1975), *cert. denied*, 423 U.S. 1015 (1975)	18
Scroll, Inc. v. Comm'r, 447 F.2d 612 (5th Cir. 1971)	18
Simon v. Comm'r, 830 F.2d 499 (3d Cir. 1987)	14
Stoumen v. C.I.R., 208 F.2d 903 (3d Cir. 1953)	14
Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, 857 F.2d 1107 (6th Cir. 1988)	2, 9
Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, 698 F. Supp. 698 (W.D. Mich. 1987)	2, 9
Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Fuqua Industries, Inc., 981 F.2d 1248 (table) (3d Cir. 1992)	1
Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Fuqua Industries, Inc., —— F. Supp. ——, 1992 WL 70418, 15 (BNA) E.B.C. 2271 (E.D. Pa. 1992)	2, 3
Textile Workers Pension Fund v. Standard Dye and Finishing Company, 725 F.2d 843 (2d Cir. 1984)	7, 16

TABLE OF AUTHORITIES—Continued

	Page
United Retail & W.E.T.L.U. 115 Pension Fund v. Yahn & McDonnell, Inc., 787 F.2d 128 (3rd Cir. 1986) aff'd by an equally divided Court, *sub nom. PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1981)	9, 12, 15
United States v. Janis, 428 U.S. 433 (1976)	17
Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502 (D.C. Cir. 1984)	16

STATUTORY AND CONSTITUTIONAL PROVISIONS

Bankruptcy Code, 11 U.S.C. § 547	8
Constitution of the United States, Amendment V	4, 5
Employee Retirement Income Security Act, as amended by Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1001 et seq.	
§ 1002(2)	ii
§ 1002(37)(A)	ii
§ 1301(a)(3)	ii
§ 1301(b) (1976)	7
§ 1301(b)(1)	2, 6, 9
§ 1362(d) (1982) (obsolete)	2
§ 1364	7
§ 1381	8
§ 1381(a)	6
§ 1382	8
§ 1391(b)	8
§ 1392	4
§ 1392(c)	4, 18
§ 1398 (1982) (obsolete)	2
§ 1399(b)(1)	8
§ 1401(a)	4
§ 1401(a)(3)	12, 13, 15
§ 1401(a)(3)(A)	*passim*
§ 1401(b)(2)	11
§ 1451(a)	11
§ 1451(c)	11
§ 1451(f)	8

TABLE OF AUTHORITIES—Continued

	Page
Internal Revenue Code of 1986, 26 U.S.C.	
§ 72	5
§ 83	5
§ 269	3, 4
§ 269(a)	18
§ 355	10
§ 402(b)	5
§ 404	5, 17
§ 404(a)(5)	5
§ 414	8
§ 414(b)	6
§ 414(c)	6
§ 1501	5
Judicial Code, 28 U.S.C.	
§ 1254(1)	3
§ 1291	12
§ 2101(c)	3
§ 2403(a)	3
National Labor Relations Act, 29 U.S.C. § 186(c)(5)	ii
REGULATIONS	
Department of Treasury, Internal Revenue Service, 26 C.F.R.	
§1.414(c)-1	8
§ 1.1502-2	5
§ 1.1502-6(b)	8
§ 1.1502-11	5
§ 1.1502-12	5
§ 1.1502-77(b)	8
Federal Rules of Appellate Procedure, 28 U.S.C.A.	
35	3
40	3
Rules of the United States Court of Appeals for the Third Circuit, 28 U.S.C.A.	
12(6)	3, 12
IOP 6.2.2(b)	15
IOP 9.5.1	3

TABLE OF AUTHORITIES—Continued

	Page
Pension Benefit Guaranty Corporation, 29 C.F.R.	
§ 2612.2	8
§ 2641.4(a)(1)	12
§ 2641.4(a)(2)	13
OTHER	
2 Wigmore on Evidence (Chadbourn rev. ed. 1979)	14
Opinion Letters in Securities Matters), 8 *Securities Law Series* (Clark Boardman 1980)	10
"The Soap Opera At Fuqua Industries," *Fortune* (November 16, 1981)	10
Statement of Rep. Thompson, 126 Cong. Rec. H7899 (daily ed. August 26, 1980)	13

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PETITION FOR WRIT OF CERTIORARI

Petitioners Teamsters Pension Trust Fund of Philadelphia and Vicinity and Charles J. Schaffer, Jr., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in its case No. 92-1340 on November 3, 1992. A timely petition for panel rehearing was denied on December 3, 1992.

OPINIONS BELOW

The judgment order of the Court of Appeals for the Third Circuit is reported in table format at 981 F.2d 1248 (table) and is reprinted in the Appendix to this Petition, page 1a, *infra*, along with the order on the petition for rehearing, p. 80a, *infra*.

The memorandum decision of the District Court is published as *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Fuqua Industries, Inc.*, 1992 WL 70418, 15 (BNA) Employee Benefits Cases 2271 (E.D. Pa. 1992). It is reprinted in the Appendix to this Petition, page 3a, *infra*.

The decisions of Arbitrator James H. Jordan have not been reported. They are reprinted in the Appendix to this Petition, page 20a, *infra*.

A separate facet of the assessment of the Fund below is addressed in *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 698 F.Supp. 698 (W.D. Mich. 1987) and *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 857 F.2d 1107 (6th Cir. 1988). The issue was whether, as in parallel tax law, joint liability for pre-divestiture obligations continues after a "reorganization" under the language of 29 U.S.C. §§ 1398, 1362(d) (1982) (obsolete) allowing multiple corporate successors in a "division" of a control group "employer" under 29 U.S.C. § 1301(b)(1).[1] The claim was only mentioned below and these opinions have not been reproduced in the Appendix. The United States District Court for the Western District of Michigan directed arbitration of the "evade or avoid" portion of the case leading to the present petition. That order was not appealed.

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[1] The Third Circuit has declined to follow the Sixth Circuit on this point as a matter of law before arbitration, *The Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 704 F. Supp. 1277, 1284, 1287-1289 (D.Del. 1989). See also, *Marvin Hayes Lines, Inc. v. Central States S.E. & S.W. Areas Pension Fund*, 814 F.2d 297, 300 (6th Cir. 1987) (no jurisdiction on merits before arbitration). The issue is currently awaiting decision by Arbitrator Robert Nagle, a former Executive Director of the Pension Benefit Guaranty Corporation, in that case. The "accrual" approach has the effect of freeing a strong acquiring company from a "poison pill" of preexisting liability in an acquisition of control of a troubled company absent a voluntary corporate merger.

STATEMENT OF JURISDICTION

A panel of the United States Court of Appeals for the Third Circuit entered a judgment order under Rule 12(6) (3d Cir.), on November 3, 1992, p. 1a, *infra*. The judgment affirmed an order of the United States District Court for the Eastern District of Pennsylvania published at 1992 WL 70418, 15 (BNA) Employee Benefits Cases 2271 (E.D. Pa. 1992). A timely combined petition for rehearing by the panel and suggestion of rehearing *in banc* pursuant to Fed.R.App.P. 40, 35 and Internal Operating Procedure 9.5.1 (3d Cir.) was filed on November 17, 1992. The petition for rehearing was denied on December 3, 1992, p. 81a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2101(c), with respect to a petition for a writ of certiorari from a final judgment of the United States Court of Appeals for the Third Circuit.

The judgment of the Third Circuit affirms a holding that 29 U.S.C. § 1401(a)(3)(A) is unconstitutional as applied to this case and 28 U.S.C. § 2403(a) thus may be applicable. Neither the United States District Court for the Eastern District of Pennsylvania nor the United States Court of Appeals for the Third Circuit, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General that the constitutionality of an Act of Congress was brought into question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 269. *Acquisitions made to evade or avoid income tax*

(a) In General—If—

(1) any person or persons acquire, or acquired on or after October 8, 1940, directly or indirectly, control of a corporation, or

(2) any corporation acquires, or acquired on or after October 8, 1940, directly or indirectly, property

of another corporation, not controlled, directly or indirectly, immediately before such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation,

and the principal purpose for which such acquisition was made is evasion or avoidance of federal income tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then the Secretary may disallow such deduction, credit or other allowance. For purposes of paragraphs (1) and (2), control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock of the corporation.

29 U.S.C. § 1392, *Obligation to Contribute; Special Rules*

* * * *

(c) If a principal purpose of any transaction is to evade or avoid withdrawal liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

29 U.S.C. § 1401(a). *Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.*

* * * *

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of evidence that the determination was unreasonable or clearly erroneous.

Constitution of the United States, Amendment V, *Grand Jury Indictment For Capital Crimes; Double Jeopardy;*

Self-Incrimination; Due Proces Of Law; Just Compensation For Property

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in ttime of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Interstate Motor Freight System ("Interstate") was incorporated in Michigan in 1932 and was, until its demise, a common carrier providing trucking services. In 1968, Fuqua Industries, Inc. (interchangeably with J.B. Fuqua, "Fuqua") acquired 100% of the outstanding common stock of Interstate. Fuqua held Interstate as a wholly-owned subsidiary from September, 1968 to November 1, 1980. Fuqua received substantial tax benefits in the form of deductions for pension contributions, depreciation, investment tax credits and related items by filing a consolidated federal income tax return with Interstate.[2]

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[2] The private pension system is built upon the advance deductibility of both the principal and interest on pension plan contributions to a "qualified" pension trust under 26 U.S.C. § 404. In the absence of this special provision, contributions would be deductible only when the employee retires or has an unconditional right to the money under general tax principles codified in 26 U.S.C. §§ 404 (a)(5), 402(b), 83, 72. This date can be many years after a contribution to the pension trust.

The advance deduction allowed by 26 U.S.C. § 404 is available to members of a commonly controlled group of corporations by filing a consolidated income tax return, 26 U.S.C. § 1501; 26 C.F.R. §§ 1.1502-2, 1.1502-11, 1.1502-12. This deduction is rationally

In operational terms, Interstate was primarily a truckload or "TL" carrier. The administrative deregulation of the TL segment of the trucking industry began in 1978 and 1979. Interstate's financial fortunes declined immediately and dramatically in response to the administrative process of deregulation.

Fuqua was politically well connected. It had become aware of the deregulation process in 1975, through, among sources, an administrative assistant to President Ford. Its controlling officer, J.B. Fuqua, was a former chairman of the Democratic Party in Georgia. His Executive Committee colleague, "closest friend" and confidant, Carl E. Sanders, is a lawyer and former Governor of Georgia. Despite knowledge of impending deregulation, J.B. Fuqua rejected a spinoff of Interstate in 1977. Shareholders would have benefited as Interstate was profitable at the time and a high price/earnings multiple for trucking companies prevailed in the stock market. He rejected a suggestion for sale of Interstate to Thomas Nationwide at the same time.

Fuqua had begun examining responses to deregulation at least by 1978. This process was substantially complete by early 1980 through a process of internal review and outside consulting. The consensus from that advice suggested that Interstate should "shrink" into the dominant regional carrier in the Midwest and East Central states with Fuqua's support. This would enhance the value of Interstate and allow it to be sold profitably several years down the road. In apparent reliance on this advice, J.B. Fuqua rejected suggestions to sell, spin off or otherwise

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counterbalanced by a charge in the form of withdrawal liability on all businesses under common control, 29 U.S.C. §§ 1381(a), 1301 (b)(1); 26 U.S.C. § 414(b), (c), when the employer is freed from a contractual obligation to fund the underlying pension debt to employees. Cf., *Comm'r v. Tufts*, 461 U.S. 300, 306-308 and nn. 4, 5 (1983) (imputed income is a rational response to "forgiveness" of non-recourse debt underlying prior deduction).

divest Interstate as a subsidiary even after formal passage of trucking deregulation legislation in July, 1980.

In late July, 1980, Congress was on the verge of passing a statute extending direct pension liability to Fuqua for trucking industry plans to which Interstate contributed in the event of a collapse of Interstate. Interstate was the largest carrier in the Midwest. Its large potential liability to the Central States, Southeast and Southwest Areas Pension Fund was obvious.[3] At the end of July, 1980, Wilson Freight—a comparable carrier with financial problems similar to Interstate—went into bankruptcy liquidation. J.B. Fuqua suddenly changed his mind in late August or September, 1980 and directed a spinoff of Interstate.

No new factor intervening between July and September 1980 other than withdrawal liability has even been identified as a reason for the sudden change. The divestiture process was abbreviated. The Board of Directors received only three short financial exhibits to support their decision: pro forma profit and loss statements with and without Interstate and an exhibit on the relative leverage of Fuqua and Interstate. Fuqua claims that there was no other research into legal questions, capital needs, viability, financing needs or other matters. The

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[3] Fuqua and Interstate were liable for this debt from 1974 forward in the event of termination of a multiemployer plan as a whole under 29 U.S.C. §§ 1364, 1301(b) (1976) (obsolete); *PBGC v. Ouimet Corporation*, 630 F.2d 4 (1st Cir. 1980). The 1980 legislation shifted the liability "trigger" from termination of the entire plan to the withdrawal of a single "employer." In *PBGC v. R.A. Gray & Company*, 467 U.S. 717, 723-724, 730-732, 734 (1984), the Court upheld the constitutionality of the retroactive application of MEPPAA based, in part, on a determination that Congress could rationally expect that sophisticated corporations would seek to avoid the pending legislation by quick action. In *Textile Workers Pension Fund v. Standard Dye Finishing*, 725 F.2d 843, 850-851 (2d Cir. 1984), the Second Circuit noted that employers had fair notice of withdrawal liability by the summer of 1980.

minutes reflect concern over a guarantee of Interstate debt. J.B. Fuqua did not even attend the meeting to explain his decision.

Interstate continued to operate after the spinoff. This was done with the support of lenders as the market for liquidation of trucking companies at the time was worse than the cost of subsidizing operating losses. The lenders were unsecured and were unable to declare a default until a deferred first payment became due in 1983. At that time, they obtained security in all of the assets of Interstate and its subsidiaries. After the one-year period for an insider preference under 11 U.S.C. § 547, Interstate was forced into bankruptcy in April, 1984. It was subsequently liquidated for the benefit of its institutional lenders with no payment on unsecured claims such as withdrawal liability.

The Fund issued an assessment of withdrawal liability to Interstate and Fuqua following the cessation of contractual contributions pursuant to statutory directive under 29 U.S.C. §§ 1381; 1382.[4] The assessment proceeded on two theories. The Fund sought $658,174 in predivestiture liability on an "accrual" theory that withdrawal liability "accrued" under the year-by-year "presumptive" method of 29 U.S.C. § 1391(b) and should follow related tax principles on continuing tax liability for joint debt on dissolution of a controlled group of corporations for such annual items. See generally, 29 C.F.R. § 2612.2 (incorporating tax regulations under 26 U.S.C. § 414); 26 C.F.R. § 1.414(c)-1 (control exists "for any period"); 26 C.F.R. § 1.1502-6(b), 1.1502-77(b) (continuing joint liability for consolidated group period taxes despite dissolution of common control). On the alternative assumption that liability hinged on "ownership" under

[4] The law requires that an assessment be made "as soon as practicable," 29 U.S.C. § 1399(b)(1). 29 U.S.C. § 1451(f) creates a six-year statute of limitations. The Fund is unaware of any other pending assessments.

29 U.S.C. § 1301(b)(1) on the date of withdrawal, the Fund assessed Fuqua on the basis that divestiture of Interstate should be disregarded as it was designed to "evade or avoid" withdrawal liability—making Fuqua liable for the full liability of $1,145,578.

The Sixth Circuit subsequently addressed the "accrual" theory of the Fund. Despite the annualized calculation methodology in the statute, it held that withdrawal liability should not be treated as an annual accrual but instead as a single liability arising on the date of withdrawal, *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 857 F.2d 1107 (6th Cir. 1988). See p. 2 and n.1, *supra*. The United States District Court for the Western District of Michigan had separately remanded the "evade or avoid" claim to arbitration, *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 698 F.Supp. 698, 703-704 (W.D. Mich. 1987). That order was not appealed.

Fuqua sugsequently filed for arbitration of the "evade or avoid" claim with the Philadelphia office of the American Arbitration Association. Arbitrator James H. Jordan was appointed to hear the dispute. Relying on *United Retail and W.E.T.L.U. 115 Pension Fund v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986) affirmed by an equally-divided court *sub. nom PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987), he held that presumption in favor of the Fund under 29 U.S.C. § 1401(a)(3)(A) could not be applied.

The "spinoff" involved a unilateral dividend of subsidiary stock by Fuqua to its shareholders without arm's length bargaining or review by independent parties. J.B. Fuqua did not testify and there are no written records of the reasons for his decision—despite a practice of keeping

Executive Committee minutes.[5] No one dared to ask him to explain the sudden change in marching orders.

The General Counsel of Fuqua acknowledged that transactional files relating to the divestiture were created. These disappeared entirely.[6] Fuqua now claims that it relied solely on three short memos to divest the eighth largest trucking company in North American with annual revenues of approximately $200 Million. It avers that the simultaneous disposition of an unrelated dairy subsidiary with withdrawal liability exposure was mere happenstance.

After the assessment, Mr. Klamon, a Fuqua executive, submited an affidavit asserting that the spinoff was part of a corporate plan to "downsize." Other evidence showed that this divestiture process only began with a later independent bid for control of Fuqua.[7] At the final hear-

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[5] Mr. Fuqua has experience with pension plan issues. See, *Fuqua National, Inc. v. U.S.*, 334 F. Supp. 1116 (S.D. Ga. 1971) (illegal loan of pension trust corpus to employer by J.B. Fuqua as trustee).

[6] The arbitrator references a Shea & Gould Opinion Letter, p. 51a. This document was in the lost files and was not produced. Its contents exist in the record only as testimony of a limited engagement to opine that 26 U.S.C. § 355 forclosed taxation of a dividend of Interstate stock. In Jacobs, "Opinion Letters in Securities Matters," 8 *Securities Law Series*, § 4.1-20 (Clark Boardman 1980), a partner in Shea & Gould, *id.*, p. vi, reminded counsel to "[d]etermine whether or not the business of the Company . . . subjects it to any special federal, state, local or foreign law, rule or regulation." No less than five law firms duly and diligently uncovered and opined about withdrawal liability without any problem in *Banner Industries -and- Central States, S.E. & S.W.A. Pension Fund*, 11 B.N.A. Employee Benefits Cases 1149, 1153 (Graham, Arb. 1989). Fuqua avoided any such "due diligence."

[7] The independent bid and results are discussed in "The Soap Opera at Fuqua Industries," *Fortune*, pp. 143, 146, 150-151 (Nov. 16, 1981).

ing, Mr. Klamon advanced more new theories that divestiture was designed to avoid disclosing a writeoff of the value of trucking operating rights and to give shareholders the opportunity for a "pure play" in trucking stock through Interstate. These reasons were not contained in any documents from 1980 nor even the earlier affidavit by Mr. Klamon.

The arbitrator nonetheless thought that the Fund had failed to prove that a principal purpose of the divestiture was to "evade or avoid" withdrawal liability. He drew no adverse inference on that point from the absence of the sole decisionmaker.[4] He noted that none of the remaining documents mentioned withdrawal liability. He saw no connection between the unexplained loss or destruction of transactional files relating to the divestiture and the effect of the absence of core documents on the ability of the Fund to show explicit consideration of withdrawal liability as a motive for the transaction. The arbitrator deemed the simultaneous divestiture of the only other subsidiary with withdrawal liability, an unrelated dairy in Toledo, Ohio, called Hawthorn Mellody, Inc., to be irrelevant.

The arbitrator, a retired business professor, then engaged in his own business analysis of the possible reasons for a rational economic man to divest Interstate. He concluded that the spinoff had a hypothetical business rationale. He did not analyze the actual motives of J.B. Fuqua—most notably his prior and virtually contemporaneous decisions against a divestiture of Interstate after consideration of all the hypothetical reasons for divestiture.

The Fund filed a timely action to vacate the arbitration award under 29 U.S.C. §§ 1401(b)(2), 1451(a), (c) in the United States District Court for the Eastern District of Pennsylvania. The District Court affirmed based on a deferential review of both the legal and factual determinations of the arbitrator. On the "presumption" issue,

the District Court held broadly that a presumption in favor of the Fund on any issue would violate Due Process, pp. 10a-11a, *infra*. With no "presumption" to regulate the arbitrator, the District Court left the arbitrator free to invent his own novel theories of law and procedure in pursuit of an idiosyncratic view of proper policy.

The judgment of the District Court was appealed to the United States Court of Appeals for the Third Circuit under 28 U.S.C. § 1291. The Third Circuit affirmed by judgment order based on the absence of an "error of law" under Third Circuit Rule 12(6) on November 3, 1992. A timely petition for panel rehearing was denied on December 3, 1992.

REASONS FOR GRANTING THE WRIT

The Court has already twice granted certiorari on the constitutionality of 29 U.S.C. § 1401(a)(3). The Courts of Appeal are now playing a cat-and-mouse game of judgment orders in these cases seeking to obscure the effective legal impact of decisions and to deflect review by this Court. The Court should address the issue in order to restore predictability and uniformity to the law.

In *PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1981), an equally divided Court upheld the decision of a Third Circuit panel that 29 U.S.C. § 1401(a)(3)(A) was facially unconstitutional. The panel in *United Retail W.E.T.L.U. 115 Pension Fund v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 135-144 (3d Cir. 1986) held that the "presumption" delegated undue power to a biased decisionmaker.

The 1986 decision of the Third Circuit was based on an initial premise that the presumption in favor of the fund would carry through the arbitration and be reviewed only under traditional rules of judicial deference to a contractual arbitrator without "plenary review over . . . findings of law," *Yahn & McDonnell*, 787 F.2d at 135, n.9. In *Huber v. Casablanca Industries, Inc.*, 916

F.2d 85, 89 n.4 (2d Cir. 1990), *cert. dismissed*, —— U.S. ——, 113 S.Ct. 1070 (1993), the Third Circuit distinguished statutory withdrawal liability arbitration from contractual arbitration. It imposed requirements providing full review of questions of law and limited review of factual issues comparable to traditional district court litigation, *id.*[8]

The constitutionality of 29 U.S.C. § 1401(a)(3) is now pending before the Court in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, No. 91-904 on review of a *per curiam* decision affirming a withdrawal liability arbitration award. If the Court reaches the issue in *Concrete Pipe* and upholds the constitutionality of 29 U.S.C. § 1401(a)(3)(A), the petition may be granted with a summary remand to the Third Circuit for reconsidera-

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[8] There is no apparent disagreement on this point. See, *Chicago Truck Drivers Pension Fund v. Louis Zahn Drug Co.*, 890 F.2d 1405, 1411 (7th Cir. 1989). The petition for certiorari in *Huber* was recently dismissed. Any issue relating to the scope of judicial review of withdrawal liability awards in that case is encompassed within the second question presented in this case.

The legislative history indicates that a withdrawal liability arbitrator is to act in the manner of a trial judge, as opposed to a commercial or labor arbitrator who tries to reach a compromise. See 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (statement of Rep. Thompson). PBGC has implemented this directive through regulations. The arbitrator "shall follow applicable law," 29 C.F.R. § 2641.4(a)(1). The regulations also make discovery comparable to federal court procedures a mandatory feature of any withdrawal liability arbitration, 29 C.F.R. § 2641.4(a)(2), to assure that employers will have the census data and other documents needed to do their own calculations and rebut actuarial assumptions made by a pension fund. C.F. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 and n.4 (1974) (Due Process prevents a party from handling evidence in a fashion which prevents rebuttal of administrative determinations). The *Bowman* analysis applies to the disappearance of records in this case which has made it impossible for the Fund effectively to rebut self-serving statements by Fuqua.

tion. If the Court does not reach the issue in *Concrete Pipe*, this case presents an apt opportunity to address the issue on the basis of concrete facts and historical experience.

This case has been fully tried and the effect of the presumption is central to the outcome. The sole decisionmaker did not testify to rebut circumstantial evidence of evasive intent. The core transactional files relating to the divestiture of the largest motor carrier in the Midwest with annual revenue around $200 Million simply disappeared. It is impossible for the Fund to carry the burden of proof imposed by the courts below (under color of the Due Process clause and arbitral discretion) in this situation.

The statutory "presumption" places an explicit restriction on the arbitrator whose constitutional scope clearly encompasses the common law. In *Pepper v. Litton*, 308 U.S. 295, 306 (1939), the Court found a common law burden of proof on a parent corporation to show fairness in a transaction with a controlled subsidiary. In *Mammoth Oil Co. v. U.S.*, 275 U.S. 13, 36, 52-3 (1927), this Court directed judgment for the government where circumstantial evidence suggested improper activity and the sole decisionmaker failed to testify. See also, *Simon v. Comm'r*, 830 F.2d 499, 506 (3d Cir. 1987) (taxpayer with burden of proof loses due to failure of architect of transaction to testify); *Stoumen v. Comm'r*, 208 F.2d 903, 907 (3d Cir. 1953) (similar; no duty to call adverse party as a witness). This adverse inference from the absence of a party witness and documents normally created in a transaction has existed since 1722. 2 Wigmore, *Evidence*, § 285 (Chadbourn rev. 1979). In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 1791-1792 (Brennan, Marshall, Blackmun, Stevens, JJ.), 1801-1803 (O'Connor, J., concurring in judgment) (1989), the Court emphasized the difference between proof of actual reasons and motivations for a decision and *post-hoc* hypothesis and rationalizations of plausible

legal motives for the same conduct. With the statutory presumption in place, the statutory withdrawal liability arbitrator and lower courts were not free simply to ignore history, the rulings of this Court and the directives of Congress in pursuit of their own concept of a proper result.

I. THE THIRD CIRCUIT HAS SPLIT WITH THIS COURT AND OTHER CIRCUITS IN OVERTURNING THE REBUTTABLE PRESUMPTION OF 29 U.S.C. § 1401(a)(3)(A) IN A CIVIL CASE

The Third Circuit entered a judgment order based on the absence of an "error of law," Internal Operating Procedure 6.2.2(b) (3d Cir.). It affirmed a broad holding that a withdrawal liability assessment "cannot be accorded a presumption of correctness because such a presumption violates . . . procedural due process rights . . . guaranteed by the Fifth Amendment," p. 10a, *infra*. The proposition that 29 U.S.C. § 1401(a)(3)(A) may not constitutionally codify a common law burden of proof or adverse inference rule and make it mandatory in a civil case is unprecedented.

The Third Circuit decision in this case is in direct conflict with decisions of this Court and other circuits. It unjustifiably expands the concerns of *Yahn & McDonnell* about trustee misuse of information solely in the hands of a pension fund to a broad holding, invalidating —as a matter of constitutional law—any effort to impose a burden of proof upon a nominal "defendant" in a civil case.

The two prior grants of *certiorari* on this issue reflect the conflict in the circuits. The Third Circuit has overturned the "presumption" based on its erroneous conclusion that the trustees exercise judicial power and have a structural bias, *Yahn & McDonnell*, 787 F.2d at 135-144. All other Courts of Appeal which have considered the issue have upheld the constitutionality of 29 U.S.C. § 1401(a)(3). See *Keith Fulton and Sons, Inc. v. New*

England Teamsters and Trucking Industry Pension Fund, 762 F.2d 1137, 1140-1146 (1st Cir. 1985) (*en banc*); *Textile Workers Pension Fund v. Standard Dye and Finishing Company*, 725 F.2d 842, 855 (2d Cir. 1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Va. Pension Fund*, 718 F.2d 628, 639-42 (4th Cir. 1983); *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1403-04 (9th Cir. 1984); *Washington Star Company v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C. Cir. 1984). See also, *Michigan Utd. Food & Commercial Workers Pension Fund v. Eberhard Foods, Inc.*, 831 F.2d 1258, 1260-1263 (6th Cir. 1987) (statutory gloss as burden of proof without reaching constitutional issue). The approach of the courts upholding the "presumptions" read the statute as a simple allocation of the burden of proof in a civil case.

The constitutionality of 29 U.S.C. § 1401(a)(3)(A) as a restatement of the common law allocating the burden of proof to an employer on information within its control is clear. In *Lavine v. Milne*, 424 U.S. 577, 585 (1976), the Court held:

> Where the burden of proof is on a given matter is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation of application. It may be that establishing the absence of an illicit motive—as [the section in question] requires appellees to do—is difficult, although as appellant argues, an applicant's motive should be best known by the applicant himself. However that may be, it is not for us to resolve the question of where the burden ought to lie in this issue. Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of constitutional moment.

Despite this unequivocal and binding holding, the District Court and judgment order of the Third Circuit con-

cluded that 29 U.S.C. § 1401(a)(3)(A) cannot constitutionally be applied to require Fuqua to bear the burden of proof on an illicit motive issue. The conflict is thus with this Court as well as other circuits.

II. THE ISSUE IS VITALLY IMPORTANT AS THE THIRD CIRCUIT DECISION INVALIDATES THE PARALLEL "PRESUMPTION OF CORRECTNESS" APPLIED TO FEDERAL TAX ASSESSMENTS

The Third Circuit has charged off as a knight errant on a mission to correct perceived inequity in the withdrawal liability arena with a constitutional lance. The Third Circuit has simply galloped past issues of statutory interpretation in its quest. The breadth of its constitutional holding in this case threatens to mire the tax litigation system of the United States with dilatory constitutional challenges to tax assessments. The taxpayer need only claim structural "bias" on the part of IRS administrators, whose bonuses now may hinge on the amounts collected under current federal compensation rules, seeking to maximize recovery.

The statutory presumption established by 29 U.S.C. § 1401(a)(3)(A) is an exact parallel of the "presumption of correctness" used to allocate the burden of proof for the entire tax litigation system of the United States. See generally, *Botany Worsted Mills v. U.S.*, 278 U.S. 282, 289-90 (1929) (presumption of correctness in favor of tax assessment); *United States v. Janis*, 428 U.S. 433, 440 (1976) (policy behind the presumption of correctness and burden of proof applicable to both tax collection suits and tax refund suits). See also, *Anastasato v. Comm'r*, 794 F.2d 884, 886-887 (3d Cir. 1986) (tax rule shifts burden of proof). This parallel is the natural result of the economic base of pension plans in the deduction allowed by 26 U.S.C. § 404, see n.2, *supra*, and use of the tax "assessment" procedures as a prototype for withdrawal liability collection.

The statutory section on withdrawal liability evasion in 29 U.S.C. § 1392(c) specifically at issue here is plainly drawn directly from the language concerning tax evasion in 26 U.S.C. § 269(a). The constitutionality of the tax presumption has been upheld based, in part, on the taxpayer's control of relevant information, *Rockwell v. Comm'r*, 512 F.2d 882, 887 (9th Cir. 1975) *cert. denied*, 423 U.S. 1015 (1975). See also, *Psaty v. U.S.*, 442 F.2d 1154, 1160 (3d Cir. 1971) (tax assessment places the burdens of production and persuasion upon the taxpayer as ". . . the taxpayer has more readily available to him the correct facts and figures"). The Third Circuit, *Herculite Protective Fabrics Corp. v. Comm'r*, 387 F.2d 475, 476 (3d Cir. 1968), and others, see, e.g., *Scroll, Inc. v. Comm'r*, 447 F.2d 612, 616 (5th Cir. 1971), have required the taxpayer to bear the burdens of production and persuasion on evasive intent under 26 U.S.C. § 269(a) under the tax rule.

The Third Circuit has now endorsed a contrary rule of constitutional force. A taxpayer can simply destroy his records and make the rules regarding documentation of income and expense and recordkeeping meaningless. Without the aid of the tax "presumption" to allocate the burden of proof to the taxpayer in such cases, the government will be stymied in efforts to collect—as the pension fund has been in this case.

CONCLUSION

The Court should defer consideration of this petition for writ of certiorari until a decision in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, No. 91-904, now pending before this Court. If *Concrete Pipe* upholds the constitutionality of 29 U.S.C. § 1401(a)(3)(A), in whole or in part, the petition should be granted and the case remanded for reconsideration. If *Concrete Pipe* does not reach the issue, the petition should be granted to resolve

this important issue on which the Court already twice has granted *certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1340

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; CHARLES J. SCHAFFER, JR., Its Administrator and a Fiduciary

v.

FUQUA INDUSTRIES, INC.

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY and CHARLES J. SCHAFFER, JR.,
Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 90-06872)
District Judge: Hon. Louis Charles Bechtle, Chief Judge

Submitted Under Third Circuit Rule 12(6)
October 23, 1992

Before: COWEN, NYGAARD and SEITZ, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby AFFIRMED essentially for the reasons contained in the district court's memorandum and order filed March 31, 1992.

Costs taxed against appellants.

BY THE COURT

/s/ R.J. Cowan
Circuit Judge

ATTEST:

/s/ Sally Mrvos
SALLY MRVOS
Clerk

Dated: Nov. 3, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-6872

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY and CHARLES J. SCHAFFER, JR.

v.

FUQUA INDUSTRIES, INC.

MEMORANDUM AND ORDER

BECHTLE, CH.J. MARCH 31, 1992

This action arises under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1382 *et seq.* The plaintiffs, Teamsters Penison Trust Fund of Philadelphia and Vicinity and Charles J. Schaffer, Jr. (collectively the "Fund"), seek payment for withdrawal liability from defendant Fuqua Industries, Inc. ("Fuqua"), pursuant to 29 U.S.C. §§ 1382 and 1392 (c), for the unfunded portions of Fuqua's former subsidiary's pension plan.

The Fund moves for an Order vacating an October 1, 1990 Arbitration award in which the Arbitrator determined that Fuqua did not violate § 1392(c) of the MPPAA, because Fuqua did not spin off its former subsidiary Interstate Motor Freight System Inc. ("Interstate") with a principal purpose to evade or avoid withdrawal liability. Fuqua cross-motions for an Order enforcing the Arbitration award. For the reasons discussed below, the Fund's motion will be denied and Fuqua's motion will be granted.

BACKGROUND [1]

Fuqua is a publicly held, diversified corporation organized under the laws of Delaware. Interstate, incorporated in Michigan in 1932, was, until its bankruptcy in 1984, a common carrier providing trucking services. In 1968, Fuqua acquired one hundred percent of Interstate's outstanding common sotck. Fuqua held Interstate as a wholly owned subsidiary from September 1968 to November 1, 1980.

On September 29, 1980, Fuqua's Board of Directors authorized the distribution of Interstate common stock to Fuqua common stock holders. This distribution, commonly known as a stock "spinoff," became effective as of November 1, 1980. Interstate thus became an independent publicly held corporation.

During the period of Fuqua's ownership of Interstate, Interstate was obligated under collective bargaining agreements to make contributions on behalf of certain of its employees to the Fund. Interstate's obligation continued after the spinoff, and Intertsate continued to make uninterrupted contributions until December 11, 1984, when Interstate ceased operations due to serious financial problems.[2]

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[1] This case's factual background and procedural history were set forth in opinions rendered by the United States District Court for the Western District of Michigan and the United States Court of Appeals for the Sixth Circuit. Because the facts and procedural histroy presented in those opinions are not contested by the parties and because they are relevant to the court's ruling on the parties' summary judgment motions, this court will be extracting relevant portions of those opinions. *See Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigna Trucking, Inc.*, 698 F. Supp. 698 (W.D. Mich. 1987); *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 857 F.2d 1107 (6th Cir. 1988).

[2] Interstate filed a petition seeking Chapter 11 reorganization under the Bankruptcy Code on April 11, 1984. On December 28, 1984, this proceeding was converted to a liquidation proceeding. *Teamsters Pension Trust Fund v. Central Michigan Trucking*, 857 F.2d at 1108.

In early 1985, the Fund assessed withdrawal liability pursuant to 29 U.S.C. §§ 1381 and 1399 against Interstate, on the grounds that Interstate had completely ceased making contributions to the Fund. The Fund also assessed Fuqua for that portion of the withdrawal liability attributable to the pre-1980 period of Fuqua's and Interstate's common control. Fuqua requested the Fund to review the factual and legal basis of the assessment, and in April 1986, the Fund reasserted its original assessment of withdrawal liability against both entities.

The Fund commenced this action in the United States District Court for the Western District of Michigan against Fuqua, alleging that, as a matter of law, Fuqua was liable to the Fund for the payment of that portion of Interstate's withdrawal liability attributable to the pre-spinoff period (1968-1980) when Fuqua and Interstate were under common control. The Fund also averred in a separate count, that Fuqua's 1980 spinoff of Interstate had as its principal purpose the evasion or avoidance of withdrawal liability under 29 U.S.C. § 1392(c). Therefore, according to the Fund, the spinoff should be ignored and Fuqua should be assessed withdrawal liability.

Following a lengthy statutory analysis of the MPPAA, the district court granted Fuqua's motion for summary judgment on Count I concluding that Fuqua was not liable to the Fund for that portion of Interstate's withdrawal liability when Fuqua and Interstate were under common control. The district court held that because the spinoff of Interstate was a genuine change in corporate structure and not a sham, Fuqua, as the predecessor employer, could not be assessed withdrawal liability upon Interstate's subsequent bankruptcy and withdrawal from the pension plan.[3] The district court, however, did not

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[3] In affirming the district court's opinion, the Fifth Circuit stated:

> [T]he statutory language of ERISA/MPPAA does not provide for the subsequent imposition of withdrawal liability on a

consider the merits of the Fund's allegations raised in Count II, i.e., whether the principal purpose of the spinoff was the evasion of withdrawal liability; rather, the court remanded that issue for arbitration.[4]

On November 13, 1987, in accordance with the Michigan district court's opinion and Order, Fuqua filed a notice of intent to arbitrate Count II, the "evade or avoid" dispute, with the Philadelphia office of the American Arbitration Association.[5] On April 27, 1988, the Fund and Fuqua attended a preconference meeting with the appointed arbitrator. At that meeting, the Fund and Fuqua agreed that the arbitrator would address the questions of burden and standard of proof before considering the issue of whether a principal purpose of Fuqua's spinoff of Interstate was to evade or avoid withdrawal liability. On October 10, 1988, the Arbirtator concluded that the Fund's determination that Fuqua's spinoff of Interstate had been intended to evade or avoid liability

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predecessor employer following a successful change in corporate structure that was accomplished without triggering contemporaneous withdrawal liability, i.e., where payments were continued after the change. Here the Fund contends that withdrawal liability must be imposed on Fuqua at the subsequent time when Interstate, the successor employer, has withdrawn from the plan.

Teamsters Pension Trust Fund, 857 F.2d at 1108.

[4] With respect to Count II, the Fund argued that if the purpose of the spinoff was to evade or avoid withdrawal liability, then, notwithstanding the court's conclusion that the spinoff was a change in corporate structure, Fuqua would be liable for withdrawal liability pursuant 28 U.S.C. § 1392(c).

The Sixth Circuit affirmed the district court's decision on Count I. Because the district court remanded Count II for arbitration, that issue was never considered by the Sixth Circuit.

[5] 29 U.S.C. § 1401(1) provides in relevant part:

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 [includes "evade or avoid" withdrawal liability] of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding . . .

was subject to *de novo* review in the arbitration, and that the Fund, as the moving party, had the burden of proof. Following a hearing, the Arbitrator issued an award and opinion holding that Fuqua's 1980 spinoff of its former subsidiary Interstate was not undertaken "with a principal purpose to evade or avoid withdrawal liability" under the MPPAA.

The Fund moves the court for an Order vacating the Arbitrator's award and Fuqua cross-moves for an Order enforcing the arbitration award.

STANDARD OF REVIEW

At this juncture this court must determine whether the Arbitrator's award in favor of Fuqua and against the Fund should be enforced, vacated or modified. Section 1401(c) of MPPAA provides that when a district courte reviews an arbitrator's award pursuant to § 1401 (b)(2),[6] the district court must presume that the arbitrator's findings of facts are correct, and are rebuttable by a clear preponderance of the evidence.[7] Although the statute does not prescribe the standard of review for legal conclusions, the Third Circuit has determined that legal conclusions are subject to *de novo* review. *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85, 86, 89 n.4 (3d Cir. 1990).

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[6] Section 1401(b)(2) provides:

> Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

[7] Section 1401(c) of MPPAA provides, "In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct."

DISCUSSION

The Employee Retirement Income Security Act ("ERISA") enacted by Congress in 1974, established, among other things, funding and vesting standards for private pension plans. *Teamsters Pension Trust Fund v. Central Michigan Trucking*, 698 F. Supp. 698, 700 (W.D. Mich. 1987). Congress's goal was to make sure that private sector employees who were promised certain benefits upon retirement would actually receive those benefits. As originally enacted, ERISA did not require a contributing employer who withdrew from a plan to incur liability. As such, those employers who withdrew from the plan relieved themselves of a financial burden, while those employers who stayed with a plan were penalized, insofar as they were required to cover the shortage caused by the withdrawing employers. *Id.* Consequently, ERISA, as originally enacted, did not require a contributing employer to continue funding the plan's unfunded benefit obligations upon withdrawal. *Id. See* 1980 U.S. Code Cong. and Admin. News, p. 2928.

In July 1980, Congress enacted Multiemployer Pension Plan Amendment Act of 1980, 29 U.S.C. § 1381 *et seq.*, to remedy the problems associated with an employer who withdraws from a multi-employer plan. *Teamsters Pension Trust Fund*, 698 at 700. The MPPAA imposed mandatory liability on withdrawing employers for a proportional share of plan's *unfunded* benefit obligations. MPPAA was designed: "to relieve the funding burden on remaining employers and to eliminate the incentive to pull out of a plan which would result if liability were imposed only on a mass withdrawal by all employers." *Teamsters Pension Trust Fund*, 698 at 700 (citing U.S. Code Cong. and Admin. News, at 2936).

The Fund's position is that Fuqua, by its corporate actions, spun-off Interstate in order to "evade or avoid" withdrawal liability.[8] In essence, the Fund claims that

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[8] In order to provide a factual background, the court will repeat the salient parts of the Arbitrator's findings of fact. For the most

Fuqua's management knew of the pending MPPAA legislation assessing withdrawal liability and, therefore, quickly arranged a spinoff of Interstate to "evade or avoid" that liability. The Fund maintains that Fuqua's justification for the spinoff are contrived and pretextual. Fuqua, on the other hand, maintains that the spinoff of Interstate was done for legitimate business reasons, primarily associated with the passage of the Motor Carrier Act of 1980 and the effective deregulation of the trucking industry and not to evade or avoid withdrawal liability. Fuqua maintains that the concept of withdrawal liability was never discussed, considered, nor even known by management of Fuqua prior to the spinoff. Fuqua contends that Interstate was unique among Fuqua's subsidiaries in that it could be easily spunoff. Moreover, Fuqua claims that the spinoff was a matter of public record.

Following four days of hearing and the submission into evidence of over eight full notebooks containing hundreds of documents as well as depositions, the Arbitrator concluded that Fuqua did not spinoff Interstate with a principal purpose to evade or avoid withdrawal liability under MPPAA.

In its motion for summary judgment, the Fund argues that the Arbitrator erred as a matter of law in (a) conducting a *de novo* hearing to determine whether Fuqua's spinoff of Interstate had as a principal purpose the evasion or avoidance of withdrawal liability, (b) his articulation of the legal standard required by MPPAA's "evade or avoid" provision, 29 U.S.C. § 1392, (c) making the factual determination that Fuqua was unaware of the concept of withdrawal liability when it spun off Interstate, (d) not drawing adverse inferences from the fact that J.B. Fuqua did not testify at the arbitration hearing nor

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part, the Arbitrator's findings of fact are not contested by the parties. Rather, the parties disagree as to the inferences that may be drawn from these findings.

by deposition, (e) not drawing adverse inferences from the alleged absence of documents, (f) excluding evidence about Fuqua's subsequent sale of Hawthorn-Mellody Dairy. The court will address the Fund's claims *seriatim*.

a. *DE NOVO REVIEW OF THE FUND'S FINDINGS*

The Fund maintains that the Arbitrator erred in conducting a *de novo* review of the Fund's finding that Fuqua's decision to spinoff Interstate was done with a principal reason to avoid or evade withdrawal liability. The Fund argues that § 1401(3)(A) affords the Fund's determinations a presumption of correctness. 29 U.S.C. § 1401 3(A) provides:

> [A]ny determination made by a plan sponsor under Sections 1331 through 1339 of this title . . . is presumed correct unless the party contesting the determination shows by a preponderance of evidence that the determination was unreasonable or clearly erroneous.

In *United Retail & Wholesale Employees, Teamsters Union Local No. 115, Pension Plan v. Yahn & McDonnell*, 787 F.2d 128 (3d Cir. 1986), *aff'd sub nom*, 481 U.S. 735, (1987) (per curiam), the Third Circuit held that a pension plan sponsor's determination cannot be accorded a presumption of correctness because such a presumption violates an employer's procedural due process rights as guaranteed by the Fifth Amendment. The Third Circuit reasoned that since plan trustees are fiduciaries of the fund, to afford such fiduciaries a statutory presumption in favor of their determination deprives an employer of its constitutional right to a fair and impartial hearing. To remedy this constitutional violation, the Third Circuit severed that section (§ 1401 (3)(A)) of the MPPAA's statutory scheme which afforded trustees the presumption

of correctness in arbitration. Accordingly, the Arbitrator's decision to grant a *de novo* hearing is affirmed.[9]

b. *THE LEGAL STANDARD REQUIRED BY MPPAA'S EVADE OR AVOID PROVISION*

29 U.S.C. § 1392 (c) provides the following:

> If a principal purpose of any transaction (i.e. a spinoff) is to evade or avoid [withdrawal] liability under this part, this part shall be applied (and [withdrawal] liability shall be determined and collected) without regard to such transaction (i.e. spinoff).

29 U.S.C. § 1392 (c).

The Fund alleges that the Arbitrator failed to apply the appropriate legal standard under MPPAA's "evade or avoid" provision, 29 U.S.C. § 1392(c). The Fund maintains that the Arbitrator required the Fund to prove that Fuqua's only purpose in spinning off Interstate was to evade or avoid liability. The Fund then concludes that under this inappropriate legal standard, the Arbitrator required it to come forward with a "smoking gun" to prove that the "*the* principal purpose" of the spinoff was Fuqua's intention to evade or avoid withdrawal liability. Fund's Motion for Summary Judgment at 3-5, 21-23.

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[9] The Fund notes that other Circuits have held otherwise. *See Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 854-55 (2d Cir. 1984); *Washington Star Co. v. Int'l Typographical Union Negotiated Pension*, 729 F.2d 1502, 1511 (D.C. Cir. 1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83*, 718 F.2d 28,639-42 (4th Cir. 1983); *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1403-04 (9th Cir. 1984); *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d 1137 (1st Cir. 1985) (en banc). *See also* Arbitrator's Decision Regarding the Burden of Proof (Exhibit N-4 at 6). *Yohn*, however, is the state of the law in the Third Circuit and controls the disposition of the matter herein.

The Fund's argument that the Arbitrator applied an improper legal standard to the facts at hand is without sufficient support in the record. The language of the Arbitrator's award clearly demonstrates that the Arbitrator understood the language of the statue, which required the Fund to prove that Fuqua's decision to spinoff Interstate was "a" principal spinoff, not "the" principal purpose of the spinoff.

Similarly without support in the record is the Fund's allegation that the Arbitrator required direct evidence, i.e. "smoking gun," linking the spinoff to Fuqua's intent to evade withdrawal liability. On the contrary, the court found that the Arbitrator plainly considered "substantive [and] inferential" evidence and was unable to conclude that Fuqua spunoff Interstate with a principal purpose to evade or avoid withdrawal liability.[10] Arbitrator's Award and Opinion (Exhibit N-10 at 40).

c. *FUQUA'S AWARENESS OF THE CONCEPT OF WITHDRAWAL LIABILITY*

In its Opinion, the Arbitrator concluded that there was no evidence that withdrawal liability or pension obligations of Interstate were considered by Fuqua's management in connection with the decision to spinoff Interstate. The Fund argues that the Arbitrator erred as a matter of law when it failed to infer Fuqua's knowledge of MPPAA from the factual record. The Fund contends, *inter alia*, that Fuqua executives must have had prior knowledge of MPPAA and its withdrawal liability provi-

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[10] The Arbitrator's Award and Opinion stated as follows:

> The record is devoid of either substantive or inferential evidence that "a principal purpose was to evade or avoid withdrawal liability." Rather, the evidence supoprts the conclusion that Fuqua made a calculated financial decision to do with Interstate what was deemed best for Fuqua: spin it off. It had many advantages for Fuqua and the fewest drawbacks of the alternatives.

Arbitrator's Award and Opinion (Exhibit N-10 at 40).

sion because notice of the Act's passage appeared in the Wall Street Journal. The Arbitrator reviewed the entire record and found that there was not a single reference to be found in any document that pertains to withdrawal liability. The Arbitrator stated that "none of the documents, including all those related to the spinoff, indicate that the participants were aware of the concept of withdrawal liability." Arbitrator's Award and Opinion (Exhibit N-10 at 32-33). Moreover, the Arbitrator concluded that the Fund did not present "a bit of evidence" to discredit testimony by Fuqua's witnesses that withdrawal liability was not a consideration in deciding to spin off Interstate. The court concludes that the Arbitrator considered the evidence and did not err as a matter of law in concluding that Fuqua was not aware of withdrawal liability when it spun off Interstate.

d. *J.B. FUQUA'S FAILURE TO TESTIFY AND FUQUA'S FAILURE TO PRODUCE VARIOUS DOCUMENTS*

The Fund argues that the Arbitrator erred as a matter of law in failing to draw an adverse inference on the issue of intent to avoid withdrawal liability from the fact that J.B. Fuqua, the chief executive officer and mastermind of Fuqua, did not testify by way of deposition or at the arbitration hearing. The Fund maintains that Fuqua's decision to spinoff Interstate was a deviation from the corporation's standard practice of buying undervalued companies and then selling them for cash at an appropriate moment. Arbitrator's Award and Opinion (Exhibit N-10 at 30). This departure from standard corporate conduct, the Fund argues, can only be explained by the advent of withdrawal liability legislation. Based on this alleged departure from standard corporate philosophy, the Fund asserts that "J.B. Fuqua's failure to testify or document the basis for his change of heart [opting for a spinoff instead of sale of Interstate] requires a

judgment for the Fund." Fund's Motion for Summary Judgment at 25.

The Arbitrator addressed all the evidence including the fact that J.B. Fuqua did not testify. In considering the evidence, the Arbitrator concluded that the Fund was not entitled to an adverse inference with respect to Fuqua's intent to avoid withdrawal liability, because the Fund had the ability and the opportunity to take J.B. Fuqua's testimony by way of a deposition or witness testimony. The Arbitrator correctly stated that if the Fund's position were adopted, "parties could build a case entirely on inference by merely deciding to not call witnesses and thus avoid cross-examination [of] the vital facts determinative of the issues at hand." Arbitrator's Award and Opinion (Exhibit N-10 at 32).

The Fund also argues that the Arbitrator erred as a mater of law by failing to draw an adverse inference from Fuqua's failure to produce documents relevant to the spin off of Interstate. Specifically, the Fund maintains that because Fuqua failed to produce transaction files which contained documents relevant to the Interstate spinoff, the Fund is entitled to adverse inference that the "documents in the file would have shown that 'a principal purpose' of the spinoff was too avoid or evade [withdrawal liability]." Fund's Motion in Reply to Fuqua's Motion for Summary Judgment at 24.

In reviewing the evidence, the Arbitrator noted the absence of the transactional file, but specifically concluded based on all the evidence that its omission did not provide sufficient proof of any wrongdoing. Although the Arbitrator may draw an adverse inference, the weight given to that inference is subject to his discretion. *International Union v. N.L.R.B.*, 450 F.2d 1329, 1339 (D.C. Cir. 1972). The court cannot conclude that the Arbitrator's judgment concerning J.B. Fuqua's failure to testify and Fuqua's failure to produce documents constitutes an error of law.

e. *EVIDENCE OF FUQUA'S SUBSEQUENT SALE OF THE HAWTHORN-MELLODY DAIRY EXCLUDED BY THE ARBITRATOR*

The Fund seeks reversal of the Arbitration Award on the ground that the Arbitrator refused to admit evidence concerning Fuqua's divesture of its former subsidiary, Hawthorn-Mellody Dairy—Fuqua's only other subsidiary subject to withdrawal liability, which occurred after the spinoff of Interstate. The Fund argues that evidence surrounding the sale of Hawthorn-Mellody is probative of Fuqua's intent to evade or avoid withdrawal liability with respect to the spinoff of Interstate.

The Arbitrator rejected the Fund's attempt to introduce, after the Fund had rested its case in chief, documents pertaining to Fuqua's 1981 sale of Hawthorn-Mellody, concluding *inter alia*, that the proffered evidence was irrelevant to the question of whether a principal purpose in the earlier spinoff of Interstate was to evade or avoid withdrawal liability. The Arbitrator properly considered the evidence's potential probative value vis a vis Fuqua's intent to avoid withdrawal liability and did not err as a matter of law in precluding its introduction.[11]

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[11] Section 26 of the American Arbitration Association Rules ("AAA"), which is applicable to the instant action, provides evidentiary standards applicable to MPPAA arbitration. Section 26 provides the following:

> Section 26. Evidence—The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. The Arbitrator may subpoena witnesses or documents upon the Arbitrator's own initiative or upon the request of any party. The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all the Arbitrators and of all the parties, except where any of the parties is absent by reason of default or has waived the right to be present.

Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes, AAA, Revised September 1, 1986 at 6. The court

f. *NO CONSISTENT EXPLANATION FOR THE SPINOFF*

Fuqua contends that the spinoff of Interstate was undertaken for legitimate business reasons, primarily associated with the passage, on July 1, 1980, of the Motor Carrier Act of 1980 ("Motor Act"). 18 U.S.C. § 1114. The Motor Act effectively deregulated the trucking industry by lowering or removing barriers that had limited, previously, truckers from carrying cetain freights, charging certain prices and using certain routes. Following the Motor Act's enactment, the passage of a Financial Accounting Standards Board ruling ("FASB ruling") became imminent. The FASB ruling required companies having motor carrier operating rights on their books to write off those rights.

Fuqua maintains, *inter alia*, that it decided to spinoff Interstate because on July 1, 1980, Fuqua had significant operating rights on the books of Interstate and Fuqua combined. Therefore, if Fuqua did not divest itself of Interstate by December 31, 1980, it would have been required by the FASB ruling to take a charge against earnings for the value of those operating rights.

The Fund argues that the reasons offered by Fuqua's to support its decision to spinoff Interstate are pretextual. In concluding that the spinoff was undertaken for legitimate business reasons, the Arbitrator weighed all the evidence, including, but not in any way limited to the effect on Interstate's operations of the interplay of trucking deregulation and the companion FASB regulations. Accordingly the court affirms the Arbitrator's judgment on this matter.

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concludes that in deciding to exclude evidence of the Hawthorn-Mellody sale, the Arbitrator properly considered and followed the applicable AAA evidentiary standard as set forth in Section 26.

CONCLUSION

Based on the foregoing, the court affirms the Arbitrator's award. In so holding the court finds that the Arbitrator considered diligently and weighed all the evidence presented and did not err as a matter of law in concluding that Fuqua did not spinoff Interstate with a principal purpose to evade or avoid withdrawal liability under the MPPAA.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-6872

TEAMSTERS PENSION TRUST OF PHILADELPHIA AND VICINITY and CHARLES J. SCHAFFER, JR.

v.

FUQUA INDUSTRIES, INC.

ORDER

[Filed Mar. 31, 1992]

AND NOW, this 31st day of March, 1992 in accordance with the Memorandum and Order, filed March 31, 1992,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendant and against the plaintiff.

BY THE COURT

ATTEST:

/s/ Marion C. Scarengelli
MARION C. SCARENGELLI
Deputy Clerk

[ENTERED 3/31/92 CLERK OF COURT]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-6872

TEAMSTERS PENSION TRUST OF PHILADELPHIA AND VICINITY and CHARLES J. SCHAFFER, JR.

v.

FUQUA INDUSTRIES, INC.

ORDER

AND NOW, TO WIT THIS 31st day of March, 1992, upon consideration of Teamsters Pension Trust Fund of Philadelphia and Vicinity's and Charles J. Schaffer, Jr.'s (the "Fund") motions for summary judgment and to supplement the record and Fuqua Industries, Inc.'s ("Fuqua") cross motion for summary judgment,

IT IS ORDERED:

1. The Fund's motion for summary judgment is *denied* and Fuqua's cross-motion for summary judgment is *granted*. The Arbitration Award of Dr. James H. Jordan is enforced in its entirety and the Fund's assessment of withdrawal liability against Fuqua is *dismissed*.

2. The Fund's motion to supplement the record is *granted*.

3. The court will consider in accordance with 29 U.S.C. § 1132(g)(1), the parties' request for attorney's fees.

/s/ Louis C. Bechtle
LOUIS C. BECHTLE
CH.J.

AMERICAN ARBITRATION ASSOCIATION
MULTIEMPLOYER PENSION PLAN
ARBITRATION RULES

IN THE MATTER OF THE ARBITRATION BETWEEN:

FUQUA INDUSTRIES, INC.

and

TEAMSTERS PENSION TRUST FUND
OF PHILADELPHIA AND VICINITY

Case Number: 14 621 0011 87 J (MEPPA)

AWARD OF ARBITRATOR(S)

I, the Undersigned Arbitrator(s), having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated October 1, 1990 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD as follows:

1. The spinoff of Interstate Motor Freight Systems ("Interstate") by Fuqua Industries, Inc. ("Fuqua") did not have as a principal purpose to evade or avoid withdrawal liability.

2. The Administrative fees of the American Arbitration Association shall be borne equally by the parties, and paid as directed by the Association.

3. The arbitrator fees and expenses shall be borne equally by the parties.

4. This Award is in full settlement of all claims submitted to this arbitration.

/s/ James H. Jordan
JAMES H. JORDAN

DATED:

STATE OF)
) ss.:
COUNTY OF)

On this ——— day of ————, 19—, before me personally came and to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

THE ARBITRATOR'S FINDINGS OF FACT ARE ATTACHED.

I. FACTUAL BACKGROUND

On or about April 9, 1985, Teamsters Pension Trust Fund of Philadelphia and Vicinity ("Fund") notified Fuqua Industries, Inc. ("Fuqua") of its determination that Fuqua had incurred withdrawal liability in the amount of $1,145,578.12 as a result of the withdrawal from the Fund of Interstate Motor Freight Systems (Interstate). Interstate was a former subsidiary of Fuqua from September, 1968 until it was spunoff as a separate entity by Fuqua on November 1, 1980.

Interstate ceased making contributions to the Fund on December 11, 1984 and filed a petition for reorganization in April, 1984, under Chapter 11 of the Federal Bankruptcy Code. The reorganization was converted to a liquidation proceeding under Chapter 7 in December of 1984.

The Fund claimed that the spinoff of Interstate did not relieve Fuqua of pension liability to the Fund, which allegedly accrued from its ownership of Interstate prior to the spinoff. Further, since the principal purpose of the spinoff allegedly was to evade or avoid withdrawal liability, the Fund contended that Fuqua was responsible for the entire liability of $1,145,578.12, under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). 29 U.S.C. § 1382.

Cross-motions for partial summary judgment were filed by the Fund and for summary judgment by Fuqua, with the United States District Court for the Western District of Michigan. The court granted Fuqua's motion for summary judgment on Count 1, holding that, as a matter of law, the 1980 spinoff of Interstate absolved Fuqua of any withdrawal liability which arose as a result of Interstate's withdrawal from the Fund. The district court remanded for arbitration Count II, the issue as to whether a principal purpose of the spinoff was to evade or avoid withdrawal liability. (*Teamsters Pension*

Trust Fund of Philadelphia and Vicinity, et al. v. Central Michigan Trucking, Inc., et al. Civil Action No. G85 653 CA 1) (W.D. Mich.)

On November 13, 1987, Fuqua filed notice of intent to arbitrate pursuant to Section 7 (a) of the Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes (the "Arbitration Rules"). Fuqua asks for a finding that it was not a principal purpose of the spinoff to evade or avoid withdrawal liability. In addition, pursuant to 29 U.S.C. S1401 (2) and Section 38 of the Arbitration Rules, Fuqua demands an award of costs, including reasonable attorney's fees, incurred by Fuqua as a result of the Fund seeking its claim. Under the "Arbitration Rules" James H. Jordan was selected as Arbitrator and the case docketed as 14 621 0011 87 J (MEPPA) by the Philadelphia office of the American Arbitration Association.

A pre-conference meeting was held between the parties and the Arbitrator on April 27, 1988 in Philadelphia, Pennsylvania on the issue of a de novo review and burden of proof. Post-hearing briefs were filed on those issues by both parties and an Award was issued on October 10, 1988.

Hearings on the issues were then held on April 10 and 11, 1989 at which time there was disagreement as to whether certain documents presented by the Fund should be accepted into evidence. Briefs were filed by both parties and the arbitrator made a Ruling on the disputed documents on August 22, 1989.

Finally, two days of hearings, January 30 and 31, 1990 were held at Atlanta, Georgia. Both parties filed post-hearing briefs and Reply Briefs. Further commentary was received from the parties, and the record closed on May 10, 1990. The parties mutually agreed that the arbitrator would have until October 1, 1990 to render his Findigs of Fact.

II. INTERSTATE AND FUQUA

Interstate was originally formed as a Michigan corporation in 1932. It was a publicly held corporation from 1950 until it was acquired by Fuqua in September 1968, as a wholly owned subsidiary.

The "corporate culture" of Fuqua provided for a great deal of autonomy for its various operating companies, and that pattern was extended to Interstate. No changes in top management were made at the time of the acquisition and Interstate continued with its existing corporate structure, having, for example, its own President, Treasurer, General Counsel etc. It provided for its own financing and credit operations and Fuqua did not guarantee Interstate's debt either to banks or other lenders. Neither did Fuqua provide any loans to Interstate or make any capital investments in it.

The President of Interstate reported to the President of Fuqua and furnished monthly profit and loss statements and balance sheets, quarterly statements, and annual statements and balance sheets. Interstate's assets and liabilities were consolidated with Fuqua's for purposes of filing Federal income tax returns.

During the period 1975-78, Interstate was one of the largest trucking companies in the U.S. and was primarily known as a TL (Truck Load) hauler, as contrasted to a LTL (Less than Truck Load) carrier. A large percentage of the TL tonnage was as an automotive parts carrier. Although TL tonnage had been undergoing a decline, in 1979 it still represented 79% of the tonnage carried and contributed 51% of the operating revenues for Interstate. LTL while only 21% of the tonnage, contributed 49% of operating revenues.

Although Interstate paid cash dividends to Fuqua of $3,000,000 for the three fiscal years ending December 31, 1977 and had a increase in net earnings for the years 1976, 1977, and 1978, earnings were off sharply in 1979.

The 1979 recession greatly impacted the automotive and automotive related industries which comprised a large share of Interstate's business. This in turn greatly affected the overall economy in the northern tier of states which represented Interstate's largest area of operations. In addition, the Interstate Commerce Commission had reversed its policy of prohibiting private carriers from engaging in for-hire operations and had issued a Special Task Force report on proposals to reform carrier entry and rate regulations. Net earnings fell from a peak in 1978 of $7,053,000 to $363,000 in 1979.

Interstate management became aware of the effects of deregulation from 1975 on surmising that there would be a negative effect on the trucking industry due to more competition for the available tonnage. Strategies of restructuring Interstate to be more of an LTL carrier rather than an automotive parts truckload carrier as well as the sale or spinoff of Interstate were discussed among Fuqua top management. However, no significant changes were made in the strategic direction of the Company's business until 1980.

As indicated above, the Government's proposals for deregulation had been widely publicized and the trucking industry had been debating the long term implications well before the time Congress passed the Motor Carrier Act on July 1 of 1980.

On April 3, 1980, Jim Hite, who had been President of Interstate from 1975 to 1978 and was then serving as Executive Vice President of Fuqua, wrote a memorandum to J. B. Fuqua, (then Chairman) and K. Slayden, (then President of Fuqua) that

> ". . . . might help us crystallize the concept and direction of our position with Interstate.'

He went on:

> "The fundamentals of that industry have not only been changing since the early 70's, but the escalated

major changes brought about by so called deregulations are here now! I believe that the economists of the freight industry will identify 1979 as the year in which the turning point occurred. The year in which the frequently predicted period of turmoil, uncertainty and profit deterioration due to the change in the regulatory environment actually began to show up on the income statements of the regulated carriers. In other words, the "*future*" we talked about so often in 77 and 78 is *here now*. The industry has been irrevocably changed. The future will require a different marketing outlook and assets that are different in structure and deployment to take advantage of the market as well as allow us to perform profitably within the future enviornment.

. . . . It's every bit as serious as we speculated it would be and we are not moving fast enough.

. . . . The basis solution is to restructure the company so that we eliminate or convert non-productive assets and so that we end up with a company that can compete in the changed market environment.

There are two ways to do this. Internally through a shrinking procedure and externally through an acquisition that allows us to shrink the two companies into one resulting company that is bigger, better and restructured for the new environment.

The second basic direction is the restructuring (disposition and conversion) of Interstates nonproductive assets into cash and/or into assets that are deployed in the productive markets. This can be accomplished through internal restructuring or through an acquisition that allows the same restructuring with synergism.

Those carriers who meet this changed environment will probably come out of this period of market shake out larger, more profitable and with less competi-

tion. It will take a period of at least three year for these market adjustments to occur and for Interstate to make the necessary adjustments before we can expect them to better the returns they generated in 77 and 78.

Our alternatives boil down to selling and deploying the cash elsewhere and/or escalating the programs we now have underway.

. . . . Without intending to prejudice the full and objective assessment of the three basic alternatives (expand, shrink or sell), it would seem our most probable course of action would be internal restructuring. The desireable candidates available for acquisition are limited. Even if we were willing to give up our position in this industry, this is not an optimum time to sell. Internal restructuring would require no additional capitol and, in fact, should free up some capitol.

In the end, if I had to set a course of action without benefit of other advice, counsel or input, I would again recommend immediate and major internal restrucuring. This is one of those rare situations, in my opinion, where even though the problem and its causes are complex, the solution is basic.

. . . . I would not exclude the right acquisition, because given the proper circumstance that would be the most productive in the short and long term and at no point are the two (internal vs. external) necessarily mutually exclusive. Given the gravity of the situation, however, if no desireable acquisition is available when the plan for internal restructuring is complete then I would begin that procedure in this calendar year."

In response to Hite's memo, Slayden engaged Booz, Allen and Hamilton, as a consultant to seek out an acquisition candidate. The option to sell Interstate at

that point in time did not seem a viable one since market valuation of trucking companies had declined due to the economic and market environments.

In a detailed July 1, 1980 memorandum, S. Norwood, the Planning Director of Fuqua, stated to Slayden:

> "Interstate is the highest priority operation within Fuqua's portfolio with regard to fundamental review, strategy, and therapy. The reasons for this are the following.
>
> 1. Interstate is highly sensitive to economic conditions and does not earn a significent return on investment, even in the good years, to justify the current level of investment.
>
> 2. Interstate earned an average RONA of only 8% during the five years 1976-1980 (the 1980 forecast is being revised downward). Even that performance masks the lower performance of the U.S. part of Interstate relative to the Canadian part.
>
> 3. Comparisons of profitability of Interstate to its U.S. competitors show it to be a below-average performer relative to other truckers with revenues over $100 million.
>
> 4. The trucking industry is undergoing major changes and it is reasonable to anticipate that competitive conditions will be more intense over the next five years than in the past five year.
>
> A. New route authorities are being granted on the basis of service capability rather than on the basis of route need,
>
> B. Private carriers soon will be allowed to backhaul other commercial freight, thereby making private cartage relatively more economical and intensifying price competition.
>
> C. Pricing by truckers' bureaus will be phased out.

. . . . These and other questions need to be addressed in my opinion by an outside consulting firm independent from the vested interests of anyone at the corporate office. Interstate is our largest investment aside from Lano, and it has been a poor performer and is now in a troubled competitive situation."

On August 14th, Norwood again wrote Slayden a memorandum which discussed the following:

"This report responds to your question of whether a spin-off could be a good alternative for Fuqua in regard to Interstate.

The best corporate strategic solution for the Interstate problem could be to spin it off to the shareholders. There are several reasons:

1. Interstate has a large enough capitalization to be an independent public company.

2. Interstate has maintained financial independence from Fuqua during our 13 years of ownership and has had independent certified audits during this period.

3. The uncertainties regarding the prospective operating environment for truckers may make a favorable divestiture impossible.

4. Interstate is believed to be a drag on the market's valuation of the rest of Fuqua.

5. The near term impact on Fuqua's income statement that could come from operating losses in 1980 and the possible forced write-off of operating rights could have a major negative effect on Fuqua's market value.

6. Removal of Interstate's cyclical profit pattern from Fuqua's "continuing operations" line would stabliize (sic) Fuqua's profit history and reduce the perception of risk.

7. A spin-off versus a divestiture has the following advantages:

a. A spin-off avoids the disposition loss.

b. F/I shareholders could enjoy a capital gain as the environment for truckers improves.

There are also some negative considerations of spin-offs:

1. There is no cash received in a spin-off. It is even possible that cash may have to be injected at the time of the spin-off to ensure its creditability and viability.

2. The spin-off can be expensive and the expenses cannot be capitalized. A registration statement for Interstate would have to be filed with the SEC and an investment banker may be needed for advise on terms of the distribution.

. . . . Interstate is different from other Fuqua operations due to its high capital intensity, and its subjection to government regulation. To understand the dynamics of a trucking company like Interstate requires far more specialized knowledge than the other Fuqua companies.

There could be an ethical and legal question raised regarding the spin-off of any company that is currently incurring operating losses. The spin-off would have to be judged to be "fair" to both Fuqua and (prospective) Interstate shareholders. Were Interstate believed to be unlikely to survive on its own, then spinning it off would represent an abdication by management of its responsibilities to its shareholders and this could become a legal problem. Our feeling, however, is that Interstate's current profit problems are not terminal, that profitability will return with the national economic recovery, and that there is potential for Interstate to actually benefit in the long run from reregulation of the industry."

On August 21, L. Klamon, Senior Vice-President and Chief Financial officer wrote to J. B. Fuqua a memo entitled "Some thoughts on spinning off IFF" which stated in relevant part:

> "1. *Board.* Although Fuqua should have some representation on Interstate's Board, there should be a majority of outsiders.
>
> If Fuqua appears to continue to control Interstate it will reduce the favorable image of getting out of the trucking business.
>
> Also, considering the likelihood that IMF will not do very well over the next several years, we don't want to be saddled with the responsibility for their results.
>
> 2. *Direct.* I believe we should spin off IMF including Direct. Even if Direct can be sold separately, IMF will need the capital to be a viable competitor.
>
> 3. *Effect on F/I.* Upon further reflection, I'm convinced that a spin off will help Fuqua in several ways.
>
> First, I believe it will increase the price of our stock. IMF is considered a negative to F/I by most analysts with whom I speak.
>
> Second, it will help improve our credit rating.
>
> Third, it will increase our return on assets, return on sales, return on equity, and it will make us a less capital intensive company.
>
> 4. *Timing.* If we announce the proposed spin off in late September or early October, we would get the maximum PR effect. If we announce closing the sale of WTVM on September 9, then closing of the Eurodollar offering on September 11 followed by the spin off, we will have three positive announcements and will draw a good deal of attention to F/I. Also, if we announce before third quarter results are re-

leased, we can show IMF as discontinued and remove a forecasted $3.1 million pre-tax loss from continuing operations. That would be a gain of about 8¢ per share for the quarter."

On September 4th, Norwood directed a memo which Fuqua, Slayden, Hite, Klamon, Fraser among others received stating:

"On September 11 at 11 o'clock three of Merrill Lynch's investment banking people will meet with us to discuss strategy with regard to interstate.

I have asked them to be prepared to discuss the following points:

- The benefits and pitfalls of spin-off relative to other possible strategies.
- The steps and procedures involved in spin-offs.
- The role of investment bankers in spin-offs.
- Merrill Lynch's specific experience in spin-offs.
- Their recommendations regarding Fuqua, Interstate, and the role they could play in our strategy."

On September 26, 1980, the Multiemployer Pension Plan Amendments Act was passed.

On September 29, 1989, at a special meeting of the Board of Directors of Fuqua, Slayden, Hite, and Klamon made a presentation and reviewed a proposal to spin off Interstate. The proposal was approved.

The Executive Committee was authorized to determine the rate of distribution and the fair market value of the Interstate shares and the distribution date was the close of business on October 31.

On November 6, 1980, a special meeting of the Executive Committee set the rate of the distribution at one share of Interstate stock for each four shares of Fuqua

common stock. It further set the fair market value of a share of Interstate to be $6.00.

Hite left Fuqua to become Chairman and Chief Executive Officer of Interstate, replacing a Mr. Austin who had held that post. Interstate operated as a publically owned and held company until it discontinued operations and entered into Chapter 7 in December 1984.

III. SUMMARY OF THE PARTIES CONTENTIONS

A. The Fund's Position.

The Fund claims that Fuqua by its corporate actions spunoff Interstate in order to "evade or avoid" withdrawal liability, and contended that the fact that Faqua took great pains to conceal its motive does not allow it to escape its burden to show that the spinoff did not have a principal purpose to avoid withdrawal liability. The Fund's position is that the law does not require it to provide direct evidence or a "smoking gun" to prove Fuqua's intent. In point of fact, the Fund believes that it has established that Fuqua's reasons were pretextual by a significant variety of circumstantial evidence it has introduced into this case.

The crux of the Fund's claim is that Fuqua management knew of the pending MEPPA legislation and the impact it would have on assessing withdrawal liability, and therefore quickly arranged a spinoff of Interstate to "evade or avoid" that liability. It draws that conclusion from a combination of factors which it claims culminated in the illegal decision to spinoff Interstate. Those factors were:

* A corporate culture dominated by one man, J.B. Fuqua whose sudden change of heart to spinoff Interstate in 1980 can only be explained by a desire to avoid withdrawal liability.

* A spinoff which was totally out of character for Fuqua. It failed to maximize the value of Interstate. Its

sudden decision and implementation was only because of the pending passage of MEPPA and ignored the sound advice to restructure Interstate.

* Fuqua understood that Interstate had no hope of survival as an independent company. Its financials were in poor shape it would lack any ability to attract new capital.

* The pattern of missing documentation and the gaps in banking and accounting documentation show evidence of the effort to "cover-up" the attempt to avoid withdrawal liability.

* The reasons given for the spinoff are contrived and pretextual.

1. Corporate Culture

The Fund claims Fuqua "was essentially a personal investment vehicle for J. B. Fuqua." His subsidiaries were run without any syngeristic strategy, as illustrated by the failure to take advantage with Interstate and Fuqua's other subsidiaries of the relaxation of private carriage rules beginning in 1978.

Fuqua was run with an emphasis on achieving maximum short run gains and to "cut losses over the long run." Norwood, the Corporate Planning Director aptly described Fuqua's corporate culture in terms of a "pattern of short term opportunities." Growth was achieved strictly by the acquisition route, and subsidiaries had complete operational autonomy with the only regular report to their corporate parent being that of a monthly profit and loss statement. This culture "encouraged a short term opportunistic view. . . ."

The Fund finds Fuqua's sense of timing notable. It attributes this, at least in part, to Fuqua's political connections which forewarned Hite, as early as 1975, about the coming deregulation of trucking. Klamon, likewise,

was the beneficiary of advance knowledge of both trucking deregulation and proposed FASB accounting rule changes. This carried over also to banking operations, to wit: "Fuqua's timing on its 1980 Eurodollar offering has also been attributed to use of advance inside information."

In 1975, J. B. Fuqua had refused to sell Interstate when he had the opportunity and at a time when market valuations of trucking companies were at attractive levels. Likewise although he had discussions about a possible spinoff of Interstate in 1977, he took no action even though he knew about the impending deregulation.

It was only in late 1980, after commissioning consultant studies which were ongoing, did "J. B." suddenly decide to spinoff Interstate. There are no records to explain this sudden change of direction and J. B. Fuqua was never called by the Company to explain his reasoning.

During the time of July-August, 1980, the Wall Street Journal had articles regarding the imminent passage of the Multiemployer Pension Plan Amendments Act. It is inconceivable to the Fund that "J. B." and other Fuqua executives were not fully aware of its implications. The only explanation for "J. B.'s" sudden reversal in August 1980 of his long standing objection to disposing of Interstate was because of withdrawal liability considerations. J. B. Fuqua is the only person who knows the real reasons for spinning off Interstate. His failure to be called by the Company can only lead to a conclusion that his testimony would be unfavorable and "His failure to testify is, of itself, sufficient basis to conclude that the spinoff was motivated by withdrawal liability consideration."

2. A "spinoff" was totally foreign to Fuqua's strategy and failed to maximize the value of Interstate.

Fuqua's corporate strategy was to buy undervalued companies and to sell them for cash at an opportune time.

Divestitures were for cash, for reinvestment in other opportunities. A spinoff was never before used by Fuqua and has not been utilized since.

Indeed, the option recommended by both management and consultants regarding Interstate was to "restructure," to shrink the business of Interstate. This would have resulted in a return of capital dividends to shareholders. Instead, the Fuqua shareholders received no benefit from their Interstate stock by the spinoff. Interstate stock was not priced with the aid of outside investment experts and was overpriced from the start at $6 per share. Accordingly, the shareholders never had a chance to profit by selling Interstate shares.

The timing of the spinoff shows evidence of the haste to avoid withdrawal liability. The management decision to spinoff Interstate was made in August. A special Board of Directors meeting was called for September 29th, and within a month all necessary actions to spinoff Interstate were taken. Moreover, the only documentation of the transaction produced by Fuqua is;

(a) A three page memorandum from the Legal Department,

(b) A short tax opinion by Shea and Gould, and

(c) Resolutions by the Board of Directors and Executive Committee.

Not only did Fuqua not wait for the consultant's report (which was made in October) it undertook no research into Interstate's capital needs, financing needs, or Interstate's viability. This lack of outside professional due diligence concealed the real reason for the spin off: avoidance of withdrawal liability.

3. Fuqua knew that Interstate could not survive as an independent company when it made the decision to spin it off.

The Fund claims that "No reasonable businessman could conclude that Interstate could shift into the LTL

market as an independent company." The testimony of expert witnesses Balsamo and Dr. Altman were offered to support that conclusion.

Mr. Balsamo testified that Interstate at the time of the spinoff had minimal working capital and its debt to equity ratio was poor. It suffered a deterioration in its financial ratios from 1977 to 1980 and a lender could easily see by an examination of its leverage and operating ratios that it would be a poor candidate for financing.

Dr. Altman testified using his statistical analysis of bankruptcy probability. (Z Score Model) This model looks at a number of financial indicators, which are assigned weights which yield a result which is used to classify whether a company is in financial distress. The results of the Z score as applied to Interstate in the third and fourth quarter of 1980 gave a financial ratio of a severely distressed company whose financial picture was similar to firms which had gone bankrupt in the past.

The only viable way that Interstate could survive was if it remained as part of Fuqua. This would have given it the ability to obtain financing to restructure which Fuqua knew would require an infusion of capital. Without this, Interstate would surely fail, as it ultimately did. Those facts were known to Fuqua management at the time of the spinoff.

4. A pattern of missing documentation in banking and accounting show an effort to avoid withdrawal liability.

The Fund argues that when the process Fuqua followed in the spinoff is compared to "due diligence" recommended by Merrill Lynch, it is evident that Fuqua was attempting to cover up the fact that its motive was to evade withdrawal liability. There is no transactional file, no record of Executive Committee meetings, and no analysis from an outside investment banker that the transaction was fair.

Further, the way Fuqua withheld from its lenders the information that Interstate was being spunoff is consistent with an attempt to conceal that it was evading its obligations on withdrawal liability. The Fund claims that the spinoff of Interstate was a default under the 1978 loan agreement of Fuqua and its lenders, and yet Fuqua never disclosed its intent to spinoff to its bankers. This failure alerted the European bank members of the syndicate for the $50 Million Eurodollar offering that Fuqua was seeking to arrange. When the European banks requested a delay in that offering to gain more information, Fuqua and Chemical Bank secretly met to close the offering before the information was made public. Although Fuqua's practice was to give written notice of significant events that might be required under the loan disclosure requirements, there is no such record of such disclosure for the Interstate spinoff.

It was in Fuqua's and Chemical Bank's interest to cover-up the withdrawal liability of Interstate and the part it played in the spinoff from the other banks. If Fuqua had incurred withdrawal liability, there would have been a significant negative impact on Chemical Bank. Because Fuqua's bank loans were unsecured, Chemical Bank ability to recover its losses would be diluted by Fuqua's withdrawal liability in the event of an Interstate bankruptcy. Therefore, a partnership between Chemical and Fuqua was made to conceal the motive for the spinoff.

The Fund contends that the arbitrator in *Banner Industries and Central States S.E. & S.W.A. Pension Fund*, 11 E.B.C. 1149, 1174 (Graham. Arb. 1989) faced similar facts when he noted:

> ". . . approval of Banner's lenders was required. Information provided by Banner to its lenders omitted any reference to potential liability arising from MPPA. At the hearing this omission was justified by Michel Alcox with an opinion that Banner's

> lenders knew about the withdrawal liability issues surrounding the Central Transport transaction. Yet, no reference to any potential withdrawal liability is found on the material produced by the lead bank, Union Commerce. Such an omission is strange."

The Fund draws the analogy that the same situation applies in the instant case. The absence of documentation leads to an inference that the true reasons for the spinoff were so problematic that this could not be in writing.

> The Fund argues that, "It is more likely that notes and files once existed and have since been destroyed or perhaps comply cannot be found."
>
> ". . . As noted, the simple failure to follow the procedures and documentation normally expected in a transaction at grounds length is grounds to infer an evasive purpose under IRC S 269—and correspondingly MPPAA."

5. The reasons given for the spinoff in the records are contrived and pretextual.

The minutes of the Board of Directors of September 29, 1980 state that the spinoff would allow Interstate to "operate more effectively as an independent business" and "adjust(ing) to the new operational environment in the motor freight business," and allow stockholders of Fuqua "to participate in the future opportunities of Interstate to expand its business."

The Fund argues that these reasons are unworthy of credence. It argues no one at Fuqua believed that Interstate could shift into the LTL market as an independent company. It simply lacked the capital needed to expand into tnat market and survive the oncoming rate wars. What Fuqua was looking for was a way to get out from under the debt of Interstate's withdrawal liability so that it could seek its own financing without the burden.

Fuqua expected the bankruptcy of Interstate. The only question was its timing.

Similarly, the shareholders of Fuqua would get no benefit from Interstate shares in a spinoff scenario. The shares were overpriced when issued and the stock immediately fell in value and never recovered. The over-allocated basis of Fuqua stock to Interstate shares made it difficult for the shareholders to avoid a loss.

Neither do the arguments for operational flexibility and incentive compensation ring true. Interstate already had the highest level of independence and autonomy of any Fuqua subsidiary. In fact, this autonomy contributed to a disregard of possible Interstate trucking for the various Fuqua subsidiaries.

Further, the presidents of subsidiaries and their top managements always had an incentive compensation arrangement. The features of those had a positive effect for both employees and their companies. The plans could have still been retained and refined for Interstate to achieve its objectives.

Therefore, the Fund concludes:

> "Fuqua divested (Interstate) with a principal purpose to evade or avoid withdrawal liability in a pattern which as become altogether too common, Banner and Commercial Lovelace, Flying Tiger and Hall's, etc. As a result, the divesture transaction is ignored in calculating and assessing withdrawal liability. Fuqua is liable to the Fund for the full assessed unfunded vested benefits of $1,098,752.44 payable in 42 quarterly installments of $35,087.25 beginning January 1, 1985 and a final installment of $23,321.65."

B. *Fuqua*

The thrust of the company's case is that the spinoff of Interstate ". . . was undertaken for legitimate business

reasons, primarily associated with the passage of the Motor Carrier Act of 1980 and the effective deregulation of the trucking industry, and was not intended to evade or avoid withdrawal liability."

The company in seeking to dismiss the Fund's claim, presents the following arguments:

- The concept of withdrawal liability was never discussed considered, nor even known by the management of Fuqua prior to the spinoff.

- The spinoff was undertaken for legitimate business reasons, stemming from the passage of the Motor Carrier Act in 1980.

- Interstate was unique among Fuqua's subsidiaries in that it could easily be spunoff. It was a viable enterprise.

- The spinoff was a matter of public record and there was no cover-up with Fuqua lenders.

- The arbitrator should award Fuqua its costs and attorney fees incurred in defending the Fund's baseless claim.

1. No one in Fuqua management was even aware of the concept of withdrawal liability at the time of the spinoff.

The company argues that there is no evidence whatsoever, either from live testimony, deposition transcripts, or documents, that shows withdrawal liability was a factor in the spinoff since no one in management was even aware of the concept. Fund witnesses, Klamon and Hite "testified that the concept of withdrawal liability was neither discussed, considered nor even known by the management of Fuqua prior to the spinoff." This is confirmed by the absence of any mention of withdrawal liability in the memorandum generated prior to the spinoff which dealt with the legal, financial and tax aspects. Shea and Gould,

the company's outside counsel, likewise made no reference whatsoever to withdrawal liability when dealing with the legal aspects of the spinoff.

Further, Fuqua's President and Chief Operating Officer (Slayden), the Treasurer (Fraser), and the General Counsel (Dowling), all testified unequivocally in their depositions that at the time of the spinoff withdrawal liability was unknown to them and it played no part in the decision.

2. The spinoff was for legitimate business reasons.

The impetus for the spinoff came about in July 1980, with the passage of the Motor Carrier Act. Various strategic options for dealing with deregulation were considered by Fuqua management. Of the three options, a sale, restructuring or a spinoff, it was Fuqua's considered judgment that a spinoff was the best alternative. A sale could not be achieved given the then market valuation of trucking companies and "Fuqua felt that Interstate was creating a drag on the value of Fuqua's securities and that Fuqua's shareholders would be better off if Interstate were separated from Fuqua."

Timing was important since a FASB Ruling was imminent requiring companies having motor carrier operating rights on their books to write off those rights. Fuqua's 1979 balance sheet recognized $18,239,000 as operating rights which if Interstate were not divested by December 31, 1980 would result in a significant charge against Fuqua's earnings, with a corresponding depressing effect on Fuqua stock.

3. Interstate could easily be spunoff as contrasted to other Fuqua subsidiaries.

Interstate, being a large subsidiary, was already set up much like an independent, free-standing corporation. It had its own management structure composed of ex-

perienced trucking executives as well as its own Treasurer and General Counsel. It had always operated quite independently from Fuqua. It was the only subsidiary that had its own financing and credit agreements.

Without a spinoff, Fuqua management would have to become more involved with Interstate, given the changed requirements due to deregulation. As a separate company, Interstate would have more flexibility to adjust to the new environment of deregulation, and Interstate management could have compensation plans based on equity in Interstate and designed to meet the competive trucking climate.

Further, Fuqua argues that as independent corporations Fuqua and Interstate would both be better viewed by the investment and banking communities since there would be a better basis on which to evaluate each company.

Despite the misgivings of the Fund's expert witnesses, Balsamo and Altman, Interstate was indeed a viable company. Interstate was able to "attract capital after the spinoff. None of Interstate's banks ever expressed concern about the spinoff or any possible effect on Interstate's ability to meet its obligations."

Hite staked his entire future on going with Interstate, and Klamon and others held substantial amounts of Interstate stock. They and the Board of Directors they helped attract to Interstate all believed that Interstate would survive and prosper and their actions support that belief.

Dr. Harris, the company's expert witness, testified that Fuqua's expectations about Interstate were not unfounded. Industry experts expected the trucking industry to recover rapidly from the recessions in 1980-81 and none foresaw the recession would be longer and deeper. As Harris testified, the experts "expected Interstate to be a viable company with positive profits, and positive net worth."

4. The spinoff was a matter of public record; there was no "cover-up" with the banks.

The day after the Board of Directors meeting of September 29, 1980, the public was informed. The appointments of the Interstate Board and Mr. Hite's selection were also publically announced. Press releases were distributed to the news media and financial analysts as well as the filing of documents with the Securities and Exchange Commission.

Further, Klamon testified on behalf of the company that every bank document introduced by the Fund showed there was no intent to withhold information or "cover-up" any transaction. None of the banks expressed concern about the spinoff, either before or after the fact, and the spinoff was not a default under Fuqua's loan covenants.

5. Fuqua requests the arbitrator to award it costs including attorney fees for its defense.

Fuqua notes that under U.S.C. § 1401 (2) and Section 38 of the Arbitration rules, the arbitrator has the authority to award costs, including attorney fees, to a prevailing party in a withdrawal liability dispute. This should be done in this case since, "All the Fund offers is baseless speculation, conjecture and innuendo."

The Company contends that the facts show the Fund had no basis on which to claim liability but its objective was to harrass and "perhaps coerce Fuqua into settlement." The record supports Fuqua's claim and fees and costs should be awarded.

IV. THE ISSUE

The sole and narrow question for decision in this case is whether Fuqua's spinoff of Interstate had as a "Principal purpose . . . to evade or avoid (withdrawal) liability" within the meaning of 29 S.C. 1392 (c).

In this Arbitrator's award of October 10, 1988 on the subject of a *de novo* review and the burden of proof it was noted:

> "The question . . . is a factual issue requiring evaluation of credibility"—ie, determining whether Fuqua did or did not have as a "principal purpose" the evasion of liability for Interstate's obligation to the Fund.
>
> The Fund does have the burden of persuasion that, more likely than not, its version of the facts is correct. But both parties in reality bear the burden of producing evidence to support their version of the facts at issue. The critical burden referred to herein is that which both parties have to persuade the arbitrator concerning the ultimate truth of the facts at issue. The arbitrator notes that the company has recognized this in Point II of its initial brief stating: Fuqua will demonstrate that the spinoff of Interstate was not intended to evade or avoid withdrawal liability."
>
> This statement recognizes that the ruling on the Fund's burden in no way creates a presumption by the arbitrator that the company's view of the dispute is correct. That is the purpose of the de novo hearing."

V. THE EVIDENCE

In accord with that ruling, both parties were given more than a full opportunity to "make their case." This was deemed especially important since the Fund in response to an interrogatory requesting it to state the basis for its allegation that the purpose of the spinoff of Interstate was to avoid withdrawal liability stated:

> "This information was based on knowledge of corporate planning and conduct in similar "spinoffs" of unprofitable operations by major corporations, the

> lack of any supporting justification for the spinoff other than debt avoidance and examination of public reports on the financial situation of (Interstate) and Fuqua in the prospectus issued by (Interstate) and Fuqua in connection with the distribution of securities of Interstate and other public financial reports."

Accordingly, to give the Fund adequate opportunity for that proof, the Arbitrator took into evidence over eight full notebooks, containing hundreds of documents as well as the depositions of Hite, Slayden, Dowling and Fraser. Additionally, the Arbitrator conducted four days of hearings where both parties had opportunity to present their witnesses and expert testimony. Post-hearing briefs and memoranda were received from both parties which were duly considered and made part of the record.

VI. FINDINGS OF FACT AND DISCUSSION

A. Legislative Context.

The time frame for the Interstate spinoff encompassed the passage of two very significant pieces of legislation that play an important part in this dispute. The Motor Carrier Act was passed on July 1, 1980, and on September 26, 1980, the Multiemployer Pension Plan Amendments Act was enacted into law.

1. MCA

The Motor Carrier Act radically changed the trucking industry. Regulations obstructing entry into the industry were eliminated allowing significant new competition, especially into the TL business. This, together with the sluggish economy, at that time, reduced tonnage drastically. It put severe pressures on carriers to find ways to adapt to the new regulatory and economic environment. Stephen Klein, a trucking analyst noted:

> "The motor carrier industry is undergoing a painful period of adjustment as the continued disman-

> tling of the protective regulatory framework thrusts truckers into a harsh, new competitive environment. Those carriers capable of meeting the challenges and hazards of the free-market climate should emerge strengthened and far more prosperous."

Interstate was already feeling the effects of the ICC's earlier loosening up on private carriage rules and the effects of a poor economy in 1970 and 1980. It was against this background that on April 3, 1980 Hite wrote his earlier cited memo to J. B. Fuqua and Slayden. A summary of his points are:

(a) Interstate's situation was ". . . every bit as serious as we speculated it would be and we are not moving fast enough."

(b) Interstate's foundation had been automotive freight and there is less tonnage and lower rates in that business.

(c) The Motor Carrier Act will result in a significant number of TL competitors who will have lower cost and lower rates than Interstate.

(d) Interstate has excess non-productive capacity that are directed at the wrong markets.

(e) Trucking companies who can effectively compete in the changed regulatory environment ". . . will probably come out of this period of market shake out larger, more profitable and with less competition.

(f) It would take at least three years for the markets and Interstate to adjust before Interstate could better the return it generated in 1977 and 1978.

(g) Fuqua's alternatives ". . . boil down to selling and deploying the cash elsewhere and/or escalating the programs we now have underway."

2. MPPAA

In late sumer and fall of 1980, Congress had been trying to finalize amendments to the Employee Retirement

Income Security Act (ERISA). One key policy concern was the cost and procedure of guaranteeing terminated multiemployer plan benefits. Finally, on September 29, 1980, MPPAA was enacted.

If MPPAA had not been enacted, liability rules for mulitemployer plans would have been similar to single employer plans. However, MPPAA established an entirely different benefit guarantee program for multiemployer plans, with a very different approach to employer liability. Liability was established for a share of the plan's unfunded vested benefits, not just unfunded guaranteed benefits, with the values to be determined by the plan actuary, not the Pension Benefit Guarantee Corporation (PBGC). Most importantly, liability would arise under special definitions of "withdrawal." The intent was to prevent an employer from simply "abandoning" a plan.

B. Withdrawal Liability

The critical section of MPPAA involved in this case, is Section 4212, which provides:

> "If a *principal purpose* of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction." (Emphasis added)

The Fund contends that the passage of MPPAA was the catalyst that lead to the spinoff of Interstate, arguing:

> "Mr. Fuqua was willing to suffer through Interstate's problems even after the formal passage of the Motor Carrier Act of 1980 in July, 1980. It was part of his standard practice. In August, 1980, he suddenly changed and focused on disposition of IMFS as an overriding priority. Fuqua has consistently engaged in a pattern of buying undervalued companies and then selling them for cash at an appro-

priate moment. . . . *Only withdrawal liability can explain the sudden change of heart and reasons for divesting IMFS* at a point where it provided no benefit to shareholders to so so—other than by avoiding exposure to withdrawal liability on Fuqua and other subsidiaries." (Emphasis supplied)

What is the evidence to support the claim?

1. Testimony and Depositions

The following all of whom were involved with the spinoff either gave depositions and/or testified at the hearings:

Klamon—	Then Fuqua Senior Vice President Finance and Administration
Hite—	Then Fuqua Executive Vice-President
Slayden—	Then Fuqua President
Fraser—	Then Fuqua Treasurer
Dowling—	Then Fuqua General Counsel

Klamon, Slayden and Hite were also all members of Fuqua's Board of Directors at the time of the spinoff.

Each and every of the above named was specifically asked on the record whether they had any knowledge at the time of the spinoff of the concept of withdrawal liability. Each gave uncontradicted testimony that they were completely unaware of withdrawal liability and that it was never discussed, considered or played any part whatsoever in the decision to spinoff Interstate.

Klamon testified:

"I might say from my perspective, I was aware that Interstate was a party to collective bargaining agreements with the Teamsters. Those agreements obligated Interstate to contribute to certain Teamster pension funds. That's as much as I knew. We never go, to my knowledge any reports; we never knew how the Funds were invested; we didn't know

whether the pension funds were overfunded, underfunded. In effect, it was just simply part of the collective bargaining agreement. It was not something that ever came to our attention. Indeed the concept that we who (sic) had somehow, would have some liability for Interstate's actions with respect to the pension fund, as I indicated, was a concept that I wasn't even aware of."

Hite, in his deposition, concurred:

Q. Had you heard the term "withdrawal liability before September 1987?

A. No. As a matter of fact I had never heard the term until I returned to Interstate late in that fall and as far as I know nobody at Fuqua had.

Q. You testified earlier that you attended a seminar where the subject of withdrawal liability was discussed. I just want the record to be absolutely clear as to the date of that seminar. What was the date or month and year of that seminar.

A. It was January of 1981 and I think it was the third week, but I'm not positive.

There is not a bit of evidence to discredit this testimony. Desipte a reference by the Fund to a remark by Mr. Klamon that some of the witnesses, Dowling, Frawer and Slayden, ". . . hadn't been honest with the Board in terms of what their position was." (In reference to a buy out of Fuqua by Forstmann-Little), that does not prove a bias towards Fuqua. In fact, one would normally expect just the opposite to be true.

The Fund goes on to argue:

"It is, however, not necessary to find anyone lied in this case. J. B. Fuqua—the focus of the decisional process and the only man privy to all elements of the decision to spinoff IMFS—simply did not appear to testify. His absence is a compelling admission that

the actual reasons for the disposition of IMFS were connected to avoidance of withdrawal liability."

Based on the fact that Mr. J. B. Fuqua did not testify in a deposition or at the hearing, the Fund argues that the Arbitrator should draw as a matter of law an inference adverse to Fuqua on the issue of *intent* to avoid withdrawal liability. However, the Fund is not entitled to that inference in this case because the Fund itself had the ability and every opportunity to have Mr. Fuqua testify on that very issue in a deposition or at the arbitration hearing.

If the Fund's position were adopted, parties could build a case entirely on inferences by merely deciding to not call witnesses and thus avoid cross-examination the vital facts determinative of the issues at hand. Accordingly, the "missing witness rule" is narrowly applied to circumstances where the witness either is truly unavailable to the party seeking to call him or where the witness refuses to testify on the issue. Neither of those circumstances are presented here and the Fund has not sustained its burden on proving that the inference should arise.

2. Fuqua Documents

The Arbitrator has reviewed all the documents introduced into the record. There is *not a single reference* to be found in any of them that pertains to withdrawal liability. None of the documents, including all those related to the spinoff, indicate that the participants were aware of the concept of withdrawal liability. Indeed, it must be noted that at the time the memos were being prepared, MPPAA had not even yet been enacted.

Nor do outside tax Counsel's Shea and Gould memorandum give any indication of discussions of withdrawal liability. Neither does the Consultant's A. T. Kearney report from John Throcmorton or the spinoff study by Merrill Lynch. Neither does the Booz Allen report, even

though it bears a date of October 21, 1980, *after* MPPAA had been enacted.

Rather, the documents expand and follow up on the concerns expressed by the Hite memo of April 3, 1980, and the memo on July 1, from Norwood, the Planning Director, to Slayden, the President.

Again, in those, there is a complete absence of any reference whatsoever of withdrawal liability. The concerns are economic. Norwood followed up his earlier memo with another to Slayden on August 14th, entitled—"Interstate A Spinoff Candidate?" Nowhere is withdrawal liability discussed in anyway.

The document flow shows the four steps recommended for a spinoff transaction by Norwood in that memo were followed:

1. Fraser wrote a memo to Slayden on the "Financial Effects of Interstate Spinoff."

2. Klamon wrote on the second of the areas in his memo to J. B. Fuqua.

3. Dowling wrote on the legal issues to Fuqua, Slayden, and Hite.

4. Fuqua's Tax Department prepared a memorandum entitled "Tax Factors of Possible Spinoff of Interstate."

Again, in reviewing these specific documents nothing is to be found in any way pointing to or referencing withdrawal liability. What does come through in a analysis of the above and the remaining documents are the principal points of top management's concerns about Interstate and what should be done about them.

* "Interstate has been a poor performer and would be valued at a substantial discount from book value in the open market. Next to Lano, Interstate is Fuqua's largest investment. Therefore, in the absence of a major (fundamental) improvement, In-

terstate will serve as a depressant to Fuqua's market value." (*Norwood memo of July 3, 1980*)

* "In general, the spinoff of Interstate would have a positive financial effect on Fuqua because of the improvement in our earnings and coverage ratios without any significant change in our balance sheet proportions. This could eventually lead to an improvement in our debt rating which would enhance the position of those holding our securities and which would result in better terms and conditions for future financing." (*Fraser memo on Financial Effects of Interstate Spinoff*)

* "Effect on F/I (Fuqua Interstate). Upon further reflection, I am convinced that a spinoff will help Fuqua in several ways.

First, I believe it will increase the price of our stock. IMF is considered a negative to F/I by most analysts with whom I speak. They repeatedly point out that we have 16% of our assets which earn us no return at present. This not only looks bad in itself, but affects the image that we are astute asset managers as shown by the National acquisition.

Second, it will help improve our credit rating. Aside from the fact that IMF's more highly leveraged than F/I, both Moody's and S&P cited the uncertainity about how IMF would do under deregulation as one reason for not upgrading our credit rating.

Third, it will increase our return on assets, return on sales, return on equity, and it will make us a less capital intensified company." (*Klamon memo to J. B. Fuqua—"Some Thoughts on Spinning Off IMF."*)

C. Fuqua's Evaluation of the Interstate Problem

The fund laid great stress on the management style of Fuqua and its strategy of buying and selling com-

panies in "the fashion of an investor." It noted in its post-hearing brief that

> Norwood, Fuqua's Corporate Planning Director, "described Fuqua's culture in business terms as a pattern of short term opportunities of which Fuqua moved quickly to take advantage."

The record reveals that trucking is a cyclical and capital-intensive business. Operating in a regulatory environment, Interstate was laregly a TL carrier heavily dependent upon the automotive industry in the Midwest which was in a relatively healthy condition *until 1978.* Operating as an autonomus subsidiary, it required little direction from Fuqua, arranging its own credit and deciding on its investments. Its financial health for the five years 1973 thru 1977 are summarized below:

	FISCAL YEAR ENDING				
	1973	1974	1975	1976	1977
Net Carrier Op. Rev.	$156,728	$181,834	$193,994	$226,823	$259,334
Pre-Tax Income	$ 9,721	$ 5,892	$ (1,120)	$ 8,332	$ 12,008
Net Income	$ 4,824	$ 3,728	$ (486)	$ 3,982	$ 6,808
Cash Flow	$ 12,524	$ 13,630	$ 12,169	$ 14,025	$ 17,107

In 1973, it paid a $4 million dollar dividend to Fuqua and paid $3 million dividends to Fuqua in each of the years 1975-76 and 1977.

In 1979 and 1980, its earning were greatly impacted by the ongoing recession, with net earning falling from a peak of $7,053,000 in 1978 to only $363,000 in 1979. Coming on the heels of this performance was the enactment of the Motor Carrier Act of 1980, over the protests of the trucking industry to retain its regulatory protection. It was clear to all in the industry that one of the major repercussion of the MCA was going to be aggressive new competition, especially for truckload carriers, and the rising use of price discounts to retain business. Profit margins were expected to be squeezed and carriers seeking to to strengthen and diversify into the more

profitable LTL segment of the market would have to find the capital to meet the higher costs required for this segment of business.

The value of operating rights had clearly been greatly diminished, if not made valueless, by the ease of entry allowed under the Act. It was evident there would be legislation to allow carriers to write off their operating rights on some basis. As a result of these factors, a great deal of uncertainty hung over the industry, since companies would have to undergo a rough period of adjustment to both an intensified competitive environment and deal with the ongoing business recession. The investment community obviously did not like what it saw of the industry. Trucking company's valuations were at a low point, with some being valued at a substantial discount from book value.

Given this background and the Fuqua method of operation, which is akin to that of a conglomerate, it was obvious that something had to be done about Interstate. As Hite wrote to Fuqua and Slayden in April of 1980- ". . . the change is here. It's here now. It's every bit as serious as we speculated it would be and we are not moving fast enough."

Fuqua had three options:

1. Sell the business.
2. Restructure it.
3. Spin it off.

1. A Sale

Given the state of the economy, Interstate's financial performance in 1979 and 1980, and the changes in trucking being brought about by the Motor Carrier Act, a sale would have been difficult to achieve and the price certainly would not be a good one. Interstate would have been probably valued at a substantial discount from its

book value and such a sale was certainly not in Fuqua's style of management. As Slayden stated about the prospects of a sale.

> "It was important to Fuqua that they not have a large loss occur on a one-time basis and it was explained to the Board that a spinoff would not create such a loss on their P & L statement."

Hite, in his April 3, 1980, had summarized the pros and cons of selling and had noted the difficulty of finding a buyer. Norwood in his August 14, 1980 memo also confirmed that:

> "The uncertainties regarding the prospective operating environment for truckers may make a favorable divestiture impossible; and . . . The near term impact of Fuqua's income statement that could come from operating losses in 1980 and the possible forced write-off of operating rights could have a major negative effect on Fuqua's market value."

Thus, there were very real problems with a sale of Interstate.

2. Restructure

Hite had recommended in his memo that Interstate should be restructured. That meant changing to shrink the dependence on the market for automotive freight and other TL markets where Interstate had excessive nonproductive assets to the more profitable LTL market.

However, this approach would require a different stategy from one that Fuqua usually took with its subsidiaries. Hite in his April 3 memo spells out what would be required of Fuqua to restructure.

> "Interstate does not have a strong program underway for restructuring the system. This is where our leadership and commitment is most needed. The reason has been a *reluctance on everyone's part to take*

the risk inherent in reducing capacity, and subsequently, revenue, without being able to clearly document the length and depth, if, any, of the earnings though the company may go through following such a restructuring. . ."

He went on to say that Fuqua would have to "Recognize that the overall *changes required are long term* and that it may take 2 to 3 years to get Interstate returns equal to or better than the 77 and 78 levels."

". . . *It will require long term commitment and the willingness to put our money up front and wait several years for the pay off.*" (Emphasis Supplied)

As the Fund itself pointed out in its post-hearing brief this was not the corporate strategy of Fuqua:

"He (J. B. Fuqua) had little or no operational interest in the companies and could not even manage to coordinate their activities to produce synergistic gains by coordinating transactions between subsidiaries—most notable trucking services to any or all of the various subsidiaries after the loosening of private carriage rules from 1978 forwardy. He relied solely on monthly financial reports to make decisions in the fashion of a personal investor seeking to maximize returns and cut losses over the long term."

Given the above observation, it can be seen a restructuring requiring the commitments cited by Hite would not be consistent with the way Fuqua management operated its subsidiaries.

3. *That left the spinoff opinion.*

No one stepped forth to claim to be the initial sponsor of the spinoff, perhaps proving the validity of JFK's observation that "Victory has many fathers—defeat is an orphan." Although Norwood attributed the idea to Slay-

den, Slayden in his deposition did not recall being the initiator of the spinoff. However, it is evident that a spinoff could not have taken place without J. B. Fuqua's approval.

It has been noted earlier that the top management of Fuqua all supported the concept of a spinoff and documented its advantages to Fuqua. In addition, Merrill Lynch in its September 12, 1980 study for Fuqua "Divestiture by Spinoff" reported:

> "Because managements have traditionally preferred to sell assets for cash whenever possible, *spinoffs have been used infrequently* as a means of divestiture.
>
> . . . *Most spinoffs have occurred when a sale was undesirable.* Antitrust rulings requiring divestiture of certain operations have been the most common causes of spinoffs. *Another frequent cause has been the desire to divest a business which had been doing poorly or did not fit with a company's other operations.* Spinofs have also been pursued when the tax liability associated with a cash sale has been prohibitive."

Under the "Conclusion" title of the report, it noted:

> "The conclusion that emerges clearly from these analyses is that, *under certain circumstances, spinoffs offer an attractive means of divesting operations.*
>
> *Perhaps the most important finding of this study is the evidence that spinoff transactions create financial value.*" (Emphasis Supplied)

It is to be noted that nowhere in the Merrill Lynch report is there a mention or any reference to withdrawal liability.

The decision to spinoff Interstate, as the documents show was made on a corporate judgment as to what was

deemed economically best for Fuqua, as a corporation not what might necessarily be best for Interstate as one of its subsidiaries.

Interstate was not producing for Fuqua. The earnings were not there and even when the economy might finally improve, the trucking industry was going to be a new, tougher competive business because of the Motor Carrier Act. To make a long term commitment to Interstate involved taking a financial risk that would do little for Fuqua's standing with the investment community and it was out of character with the way Fuqua operated.

A sale, if one could be consummated, would be on unfavorable terms. A financial "hit" would be forthcoming to Fuqua, either because of a sale or write-offs of operating rights that would be required if Fuqua kept Interstate. *Something* had to be done and a spinoff was the best financial alternative for Fuqua.

The record is devoid of either substantive or inferential evidence that "a principal purpose was to evade or avoid withdrawal liability. Rather, the evidence supports the conclusion that Fuqua made a calculated financial decision to do with Interstate what was deemed best for Fuqua: spin it off. It had many advantages for Fuqua and the fewest drawbacks of the alternatives.

Uppermost in the mind of Fuqua's management was how the financial markets would view the relationship between Fuqua and Interstate:

> "Interstate is believed to be a drag on the market's valuation of the rest of Fuqua.
>
> The near term impact on Fuqua's income statement that could come from operating losses in 1980 (Interstate) and the possible forced write-off of operating rights could have a major negative effect on Fuqua's market value." (Norwood August 14 memo)

Klamon in his August 21 memo stated:

> ". . . I am convinced that a spinoff will help Fuqua in several ways, first, I believe it will increase the price of our stock."

But, this self-interested behavior is *not* a violation of 29 U.S.C. § 1391(c). There has been no evidence presented that withdrawal liability or even the pension obligations of Interstate were ever considered to be a factor in the spinoff decision.

And yet, the Fund's theory is that Fuqua should, after evaluating all the facts, have made the decision to restructure Interstate and keep it as a subsidiary. Since—

> "The ultimate conclusion of the consultants was that IMFS had a good chance of surviving a shakeout in the trucking industry, with Fuqua's patience and support, by shrinking to its strength in the midwest and east central states. This particular strategy would not have triggered withdrawal liability as the principal withdrawal liability obligations were to the Central States Funds and various funds in Pennsylvania."

But, on the other hand, the Fund also claims:

> "J. B. Fuqua had every reason to expect the demise of IMFS as a trucking company—with the timing dependent only on the market for trucking equipment and real estate."

These conflicting theories of the Fund illustrate the real problem of its case: there is no evidence to point to that withdrawal liability was the—or even a—reason it was necessary to spinoff Interstate.

Assuming arguendo, the testimony of Balsamo and Dr. Altman regarding the financial problems of Interstate reinforces the business judgment that restructuring was not the best option for Fuqua. It substantiates the conclusion reached above that looking at it strictly from

Fuqua's management viewpoint, a spinoff was its best economic alternative. The economic justification for that decision flows from an examination of the record. It requires no "hidden motive" of withdrawal liability to make a "best case" for a spinoff rather than a sale or restructuring.

There was no question but that Interstate was not going to have an easy time competing in the new, deregulated marketplace. The trucking industry as a whole in 1980 was suffering from not only recession but increased competition brought about by the early beginnings of deregulation. The outlook of industry experts was that economic activity would probably pick up sometime in 1981 but even then trucking companies would have to go through a rough period of adjusting to deregualtion but that the long term effect could be favorable.

The U.S. Department of Commerce's "U.S. Industrial Outlook for 1981" forecast that:

> "Growth in gross national product (GNP) is expected to boost truck traffic in 1981 and through 1985. Ton miles in 1981 are expected to rise to 570 billion, 2 percent above the 1980 level. For the next 5 years; traffic is expected to grow an average of 3 percent a year, to 648 billion ton miles in 1985."

Investment managers in the *Wall Street Transcript* of September 1, 1980 made these points in response to the question "What is the outlook for the trucking industry in the near term?"

> Klee: "To answer that question you have to look at two things. First, is the economic outlook. . . The other major issue that has to be considered is the regulatory picture and what the Motor Carrier Act of 1980 will hold for the industry. . ."

> Parker: "In answering your question about short term price performance, perhaps we should look at

> the longer term price also. There are three factors that cause me to be positive on the industry at this time. Number one, the cloud of uncertainty regarding the regulatory environment has been removed to a large extent. Number two, and as Marc has indicated, I think the economy and motor tonnage as well has reached its low point. . . Thirdly, I think that the competition of the Interstate Commerce Commission has shifted towards a more favorable stance regarding the motor carrier industry than was the case during the past is months."

Interstate, at that time was about the eighth to tenth largest carrier in the U.S. It was classified as a general commodity carrier, so that it could carry all but exempted commodities. It was a position to realign its capacity to emphasize the LTL market in an attempt to avoid the shakeout and consolidations in the industry which it was expected would primarily affect the smaller and medium sized carriers. The environment was expected to be tough in the immediate future but improving over the long run as the economy strengthened. The hope was Interstate could make it, but it did have problems.

Fuqua had never injected capital into Interstate and given its long-standing method of dealing with its subsidiary, it was not extraordinary that Fuqua did not undertake to examine future financing needs for Interstate. Interstate's creditors did not question or object to the spinoff although they had such a right since there is no question that its working capital, return on equity, earnings, and debt-to-equity were poor, and had to be troubling.

But there is no evidence that Interstate was insolvent at the time of the spinoff, and again no evidence that anyone was aware of or had factored in any contingent liability for withdrawal liability when it considered Interstate's financials.

Ernst and Whinney, Interstate's auditors, gave a clear opinion for Interstate for the fiscal year ending January 3, 1981. That opinion contained no qualification and is absent any reference to withdrawal liability.

On cross-examination of Fund expert witness Balsamo, the record shows:

> "Q. Would you agree with me sir, that Ernest and Whinney was not concerned at that point (January 1981) about the survival of Interstate in the next 12 months.
>
> A. Yes."

Value Line, in its trucking industry analysis of January 9, 1981, valued Interstate's net worth in 1980 to be $27 million dollars. That valuation would have been impossible had Value Line assigned any contingent liability for withdrawal liability and that valuation does not show insolvency.

In its commentary on Interstate, Value Line noted:

> "These problems aren't intractable. As the economy picks up probably in the late 81, Interstate's revenue should follow suit. Although costs are expected to rise further, margins will widen as the company increases its profitable less—than—truckload shipments. Growing at about 15% per year, LTL operations are more profitable and less vulnerable to competition than full truckload shipping. LTL will become increasingly important as trucking deregulation progresses.
>
> IMFS may trail the market in the short haul. . . . Once profits pick up, starting next year, we think this stock will show health appreciation."

The fact is that the economy *did not* pick up. The chart below from the Department of Commerce illustrates the shortfall in trucking that took place since the 3.3%

annual growth in trucking that was predicted starting in 1981 did not take place:

CARGO-TON-MILES (BILLIONS) FOR INTERCITY TRUCKING

Year	Projected	Actual
1980	555 (Actual)	555
1981	570	527
1982	589	520
1983	608	575
1984	628	606
1985	648	610

It can be seen that at no time during the five year period did the actual tonnage ever equal the forecasts. The economic downturn that was expected to end during 1981 continued into 1983, and was particularly protracted in the mid-west, where Interstate's traffic was heavily dependent.

Interstate was obviously affected by these shortfalls. However it managed to show a profit in the second and third quarter of 1981 after six quarters of deficits, and Hite began to follow the restructuring strategy he had recommended. On July 15, 1981, he wrote to shareholders:

> "We believe we are continuing to outperform the industry in revenue and tonnage growth by margins of approximately 15 percent, and 4 percent respectively in the U.S. and Canada due to our strong marketing and service programs in both countries. I am optimistic that this success will continued to result in improved earnings over the next several quarters, even though the U.S. economic outlook is still too weak and uncertain to forecast robust growth in the next term.
>
> Beginning with the third quarter, (June 20, 1981), Interstate Motor Freight System became the parent

company for six separately incorporated subsidiaries. A description of each is attached. There are many advantages to this corporate restructuring, including possible diversification in the future. The near term advantage, made possible by the Motor Carrier Act of 1980, is that as separately incorporated subsidiaries with separate rate tariffs, these companies can address markets in which they do not now participate and individually price their service commensurate with the demands of that market. We believe there is great opportunity in this strategy, but it is also a necessity that we structure ourselves to be competitive with the many new carriers entering the business as a result of the change in regulation."

Tonnage however continued to slip in 1982 and was down more than 25% from the average levels of 1977-79. With excess capacity, intense price competition developed. Interstate, which had managed to make a small profit in 1981, ($353,000) lost over $18 million dollars in 1982. It sold its Canadian operation, Direct, in 1983 as well as some of its other subsidiaries, but was forced to file for bankruptcy in 1984.

Given the lackluster performance of the economy and its effect on freight carried, Interstate's weak balance sheet was not strong enough to carry it through. But that economic outlook is not what the economic forecasters and trucking analysts were predicting in 1980. At that time there is also *no* indication that anyone was factoring in any contingent liabilities for trucking companies because of withdrawal liability.

In hindsight, Interstate's stock price of $6 per share was too high, and one can certainly take issue with the way it was determined and its price. But that is not an unknown problem, as witness the IPO marketplace. There was a market for the stock and Value Line made recommendations for the stock as late as 1982.

Hite's business plan ultimately did not succeed because Interstate required a stronger economy and financial staying power which it did not have. The larger, well capitalized carriers were the winners while Interstate fell along with Gordon's, ICX, IML, and Mason-Dixon, among many others.

In commenting on the various reasons why trucking companies failed in the June 4, 1984 issue of *Wall Street Transcript*, one investment analyst of the trucking industry made an interesting observation that:

> "Another *negative factor* (in separating successful from unsuccessful carriers) I'd look for, often deals with a trucking company that is part of a much larger, more diversified company and therefore the *trucking part of that diversified company gets the short end of the stick on management time, finances and attention versus the dominant business of that company.*" (Emphasis Supplied)

It will be recalled that the Fund opined that the Fuqua Board minutes stating the spinoff would allow Interstate to "operate more effectively as an independent business" and "in adjusting to the new operational environment in the motor freight business" were pretextual. The above comment supports the view that "stand alone" trucking companies do have an advantage.

Given the above facts, the Arbitrator again can not conclude that Fuqua was counting on an all but certain collapse of Interstate and accordingly sought to spin it off to protect itself from withdrawal liability.

The Arbitrator has also examined the Fund's claim that a systematic gap existed in the banking accounting and other documentation which would lead one to a conclusion that facts were hidden to conceal an improper motive to avoid withdrawal liability.

I have examined the multitude of documents relating to the legal, financial and tax aspects of this case. As I have

previously noted there is no mention of withdrawal liability referenced in any way. The only observation worthy of note is the lack of the transactional file relating to the spinoff which Fuqua has been unable to produce. However, given the documents produced in discovery, its omission by itself does not provide sufficient proof of any wrongdoing.

The Fund however, has claimed that evidence of a "coverup" is shown by the actions of Fuqua and its lead bank, Chemical. The claim is that they were deliberately withholding information from Fuqua's other lenders, particularly Credit Lyonnais and Dresdner. The purpose of which was to cover up a transaction (spinoff) to evade withdrawal liability. As Fuqua's loans were unsecured, assets would be diluted by the liabilities for withdrawal liability. With Chemical Bank being the largest lender it had the incentive, along with Fuqua, to hide the true purpose of the spinoff, since it would be hurt the most in a default.

First off, I find no record that the spinoff was hidden from the banks. A series of press releases about the spinoff and the newly created company were issued. Stories appeared in the financial press about the spinoff, its management and Board of Directors. Financial analysts were well aware of the facts.

Secondly, the argument that under Fuqua's 1978 loan agreement, the consent of the lenders was required for the spinoff, even if assumed true shows nothing regarding withdrawal liability. I note that all of Fuqua's lenders knew of the spinoff and took no action whatsoever. Lack of any bank action whatsoever is highly unlikely if a default is in question.

Finally, the loan agreement documents of November-December 1980 and 1981 *after the spinoff of Interstate* were a consequence of a new domestic loan Fuqua made in 1980. When that was completed Fuqua sought to

amend its syndicated loan agreements with its European bank among which the Credit Lyonnais and Dresdner, to have the foreign bank language conform with that found in its new domestic loan agreement. Examination of the documents and related correspondence simply does not support a charge that Fuqua and Chemical were doing something "under the table" to cover up an illegal evasion of withdrawal liability.

Finally, the Fund in its brief refers to an "evade or avoid" case decided by Arbitrator Graham in *Banner Industries* which it claims has the same factual situation concerning a company's lenders as is found in the Fuqua case. The Fund notes that the arbitrator in *Banner* found that:

> "Information provided by Banner to its lenders omitted any reference to potential liability arising from MPPA . . . . Such an omission is strange."

As the Arbitrator in that case found:

> ". . . . In February, 1982 its General Counsel, Ulmer, Berne, Laronge, Glickman and Curtis of Cleveland, OH. provided a memo concerning the application of MPPA to Banner and Commercial Lovelace. Additional analysis was performed for Banner by other law firms, Duvin, Flinker and Kahn; Jones, Day, Reavis and Pogue and Benesch, Friedlander, Coplan and Aronoff, all of Cleveland as well as Kirkland and Ellis of Washington, D.C. In discussions with those firms the effect of MPPA and any potentia withdrawal liability it might pose for Banner was considered . . . ."
>
> ". . . . As early as February 5, 1982 in a memo to Banner officers the law firm of Ulmer, Berne indicated that Banner faced a potential problem in insulating itself from Commercial's MPPA liability. (CS Ex. 5).

Banner conducted internal studies to explore various alternatives regarding its exposure to MPPA withdrawal liability. Michael Alcox prepared a report which set forth a number of options for Banner with respect to MPPA. That report noted that MPPA remained an obstacle in shutting down Commercial . . . ."

". . . . Subsequently, Banner consulted a number of other law firms, seeking advice concerning its potential exposure to MPPA withdrawal liability. For instance, in June, 1982 the firm of Duvin, Flinker and Kahn completed a "special research project" for Banner which concluded that "it may be possible for Commercial Lovelace to escape most of the pension withdrawal liability from the Teamsters Central States Pension Fund based upon the plan you are considering." (C8 Ex. 23).

Discussion between Banner and its accounting firm, Arthur Andersen, led Andersen to conclude that attempts to see Commercial were likely to be futile due to the possibility of the acquiring entity being held responsible for a $20 million MPPA liability . . . ."

". . . . At the hearing this omission was justified by Michael Alcox with an opinion that Banner's lenders knew about the withdrawal liability issues surrounding the Central Transport transaction . . . ."

Thus, it can be seen the facts found in *Banner* clearly distinguish it from the instant case. *Banner was fully aware of its obligation for withdrawal liability* and consulted numerous law firms, investment bankers and others trying to find a way to insulate itself from a recognized withdrawal liability. That factual situation is not present in this case.

Having considered the entire record, I can not conclude that Fuqua spunoff Interstate with a principal purpose to

evade or avoid withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980. I am thus unable to sustain the Fund's claim.

Costs and Fees

Under U.S.C. S1401(2) and Section 38 of the "Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes,"

> "The Arbitrator, in the award, shall assess against any or all parties arbitration. fees, cosst, expenses and arbitrator compensation, and may assess reasonable attorney fees. Any allocation of costs by the Arbitrator shall be consistent with the parties agreement, if any, made after the employer has received notice of the plan's assessment of withdrawal liability."

> Fuqua, in its post-hearing brief has asked for a total of $209,725.79 to be awarded to it since, "Fuqua submits that the Fund's pursuit of this litigation, when all reasonable facts indicated that there was no basis for liability, was intended purely to harass and perhaps coerce Fuqua into settlement."

Although the arbitrator is empowered by the Arbitration Rules to award reasonable attorney fees. I do not conclude that the theory posited by the Fund was so frivolous or without justification that I should depart from the well accepted norm that each party to an aribtration case should pay their own costs of representation and share equally in the cost of the arbitration itself. There was no evidence on the record to support a claim of harassment or of any action that would indicate the real purpose of the arbitration was to coerce a settlement from Fuqua.

AMERICAN ARBITRATION ASSOCIATION
MULTIEMPLOYER PENSION PLAN
ARBITRATION RULES

Case No. 14 621 0011 87 J MEPPA

IN THE MATTER OF ARBITRATION BETWEEN
FUQUA INDUSTRIES, INC.

and

TEAMSTERS PENSION TRUST FUND OF
PHILADELPHIA AND VICINITY

ARBITRATOR'S DECISION

AWARD

After a careful review of the evidence and proofs the Arbitrator finds:

The dispute between the "Fund" and Fuqua shall be decided on the basis of a de novo hearing. The Fund's determination cannot be held to be "presumptively correct" as to whether Fuqua's spin-off of Interstate had as a principal purpose the evasion of liability of Fuqua for Interstate's obligations to the "Fund".

The "Fund", as the moving party, has the burden of proof in the case.

/s/ J. H. Jordan
J. H. JORDAN
Arbitrator

Dated: 10/10/88

JHJ/alb

AMERICAN ARBITRATION ASSOCIATION
MULTIEMPLOYER PENSION PLAN
ARBITRATION RULES

Case No. 14 621 0011 87J
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IN THE MATTER OF ARBITRATION BETWEEN
FUQUA INDUSTRIES, INC.

and

TEAMSTERS PENSION TRUST FUND OF
PHILADELPHIA AND VICINITY

ARBITRATOR'S DECISION

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A preconference hearing was held in Philadelphia, Pennsylvania, on April 27, 1988, in the above-captioned matter between Fuqua Industries, Inc. and Teamsters Pension Trust Fund of Philadelphia and Vicinity for the purpose of establishing the burden of proof and other related matters in preparation for arbitration proceedings.

All parties were present and fully heard. Both parties elected to file post-conference briefs which were received, made part of the record and were fully considered.

FACTUAL BACKGROUND

On or about April 9, 1985, the Teamsters Pension Trust Fund of Philadelphia and Vicinity (hereinafter referred to as "The Fund") notified Fuqua Industries, Inc. ("Fuqua") that it had determined that Fuqua owed the Fund $1,145,578.12 as a result of the withdrawal from the Fund of Fuqua's former subsidiary, Interstate Motor Freight Systems ("Interstate"). Interstate had filed for bankruptcy in April 1984 and had ceased making contributions to the Fund on December 11, 1984.

Fuqua had acquired one hundred percent of Interstate's outstanding shares of common stock in September 1968, and from that time operated Interstate as a wholly-owned subsidiary of Fuqua.

On November 1, 1980, Fuqua spun off Interstate by a distribution of Interstate common shares to holders of common shares of Fuqua, at the rate of one share of Interstate for each four shares of Fuqua. The Fund claimed that a principal purpose of the spin-off was to evade or avoid withdrawal liability. Fuqua denied that a principal purpose of the spin-off was to evade or avoid such withdrawal liability and denied that it was liable for any withdrawal liability.

On or about July 3, 1985, the Fund commenced an action against Fuqua for the collection of withdrawal liability in the United States District Court for the Western District of Michigan. Count I of that action alleged that, as a matter of law, Fuqua is a business under common control with Interstate and thus it is jointly and severally liable for the withdrawal liability incurred by Interstate. Count II alleged that Fuqua's spin-off of Interstate had as a principal purpose the evasion of liability by Fuqua for Interstate's obligations to the Fund.

The District Court granted a motion for summary judgment made by Fuqua on Count I and absolved Fuqua

of any withdrawal liability on this count arising as a result of Interstate's 1984 withdrawal from the Fund. The Court remanded for arbitration the second Count as to whether the principal purpose of the spin-off was the evasion of withdrawal liabiilty.

On November 13, 1987, Fuqua filed a notice of intent to arbitrate the dispute as to Count II, in accordance with the Court's September 17, 1987, Opinion and Order, under 29 U.S.C. Sec. 1401.

At the preconference hearing, it was agreed that the arbitrator should first dispose of the question of the burden of proof. Once that issue is decided, the parties will address the merits of Count II of the Fund's Complaint as to whether Fuqua's spin-off was accomplished with a principal purpose to evade or avoid Fuqua's liability for Interstate's obligations to the Fund.

DISCUSSION AND OPINION

Counsel for Fuqua and the Fund have fully set out their views as to the burden of proof both at the hearing and in their post-hearing briefs. The arbitrator finds it unnecessary to separately spell out their contentions at length since they will be directly referenced herein.

Statutes

The ultimate issue present in this case arises under 29 U.S.C. Sec. 1392(c) which provides:

> If a principal purpose of any transaction is to evade or avoid liability under this part, this (Sec. 1392) shall be determined and collected) without regard to such transaction.

Regarding the burden of proof issue, the Fund claims that Section 4221(a)(3)(A) of Multiemployer Pension Plan Amendments Act ("MPPAA") provides that in any arbitration proceeding under that section:

> any determination made by a plan sponsor under Sections 1331 through 1339 of this title . . . is presumed correct unless the party contesting the determination shows by a preponderance of evidence that the determination was unreasonable or clearly erroneous.

29 U.S.C. Sec. 1401(a)(3)(A).

Fund's Position, Summarized.

The Funds' determination is considered presumptively correct unless Fuqua can show by a "preponderance of evidence that the determination was unreasonable or clearly erroneous." *Id.*

Case Law Interpretation

With the exception of the Third Circuit, the Courts of Appeals uniformly have upheld this "presumption" in favor of a Fund's trustees in its entirety.

The Fund argues in further support of this presumption that MPPAA is based on the same system as used in tax determinations in which an agency has a financial interest and federal tax cases are determined by an identical set of rules. Moreover, the Fund states that the common law supports the presumption by allocating the burden of proof to the party in control of the relevant facts. Here, Fuqua's control of the relevant information shifts the burden of proof (both production and persuasion) to Fuqua to prove its intent.

Fuqua's Position, Summarized.

Fuqua counters by arguing that the Fund's determination is so lacking in evidentiary proof that it cannot be accorded any presumption of correctness. Further, Fuqua cites the United States Third Circuit Court of Appeals (the Circuit of this proceeding) which has struck down as unconstitutional the presumption of correctness accorded to a plan sponsor's determination of

withdrawal liability, on the grounds that it violated the procedural due process rights guaranteed by the Fifth Amendment. *United Retail & Wholesale Employees, Teamsters Union Local No. 115, Pension Plan v. Yahn & McDonnell*, 787 F.2d 128 (3d Cir. 1986).

Beyond this, Fuqua states that the previous appellate decisions which have upheld the "presumption of correctness" doctrine to plan trustee determinations all involved determinations made within the trustees specialized areas of expertise, a circumstance that is clearly distinguishable from the Fund's determination in the instant case.

Accordingly, Fuqua argues for a de novo hearing at which the Fund is required to show that the spin-off of Interstate was accomplished with a principal purpose to evade withdrawal liability.

Discussion and Opinion.

The "burden of proof" normally means that the party holding the affirmative of an issue must produce sufficient evidence to prove the facts essential to its claim. However, in this case we have been cited statutory language of the MPPAA on this point, and general case law interpreting it, that the Fund claims shifts the burden to Fuqua, since the Fund's determination "is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous . . . ." MPPAA, Section 4221(a)(3)(A). The Fund determination at issue in this case is whether Fuqua's spin-off of Interstate had as a "principal purpose . . . to evade or avoid liability. . ."

The Fund's position, while thoroughly presented and well-briefed has two inherent problems. The first is that this arbitration proceeding is in the Third Circuit, where the United States Court of Appeals has held that a sponsor's determination cannot be accorded a presumption of correctness because such a presumption violates an em-

ployer's procedural due process rights as guaranteed by the Fifth Amendment.

The Third Circuit in *Yahn & McDonnell*, found that all trustees, regardless of how selected, are fiduciaries of their fund. Consequently, affording such fiduciaries a statutory presumption in favor of their determinations would deprive an employer of its constitutional right to a fair and impartial hearing.

What is most significant for this case is that the Third Circuit found that trustees do indeed have wide discretion in their determinations, and "not only are these matters in which the exercise of significant discretion is unavoidable, but the trustees' determination can be the difference between a finding of *no* liability and a finding of liability in a large amount." *Yahn*, 787 F.2d at 141 (emphasis in original). Here, the trustee determination that Fuqua's purpose in spinning-off Interstate was to avoid or evade withdrawal liability is clearly such a discretionary determination.

In contrast to *Yahn*, other federal appellate decisions which have upheld the constitutionality of trustee determinations have involved issues within either the application of MPPAA's statutory guidelines or the trustees' acknowledged expertise" over technical actuarial matters with respect to which there are often several equally " 'correct' " approaches . . ." [1] In those other cited cases, the issue was not whether there were other reasonable alternatives; rather the issue was only if there was unreasonableness in the trustee determination. That clearly is not the case here.

Therefore, this raises the second problem with the Fund's argument that the *Yahn* decision is limited to determinations over what interest rate of return or reasonable actuarial assumptions and methods is incorrect.

---

[1] See legislative history in Senate Labor Committee Summary and Analysis of Consideration of S 1076 (April 1980).

The Third Circuit, in *Yahn*, specifically stated the precise issue therein:

> The constitutional question before us is whether the MPPAA denies procedural due process to withdrawing employers; who owe a fiduciary duty to the plan and thus are putatively predisposed to impose excessive liability on withdrawing employers, coupled with the presumption in favor of that determination in arbitration and the further deference given the arbitrator's decision in district court, results in the denial of due process to withdrawing employers.

While the Fund presents a number of arguments attempting to distinguish and explain away that case's control on the instant case, all of which the arbitrator carefully considered, it is clear that the Third Circuit holding in *Yahn*, affirmed by the United States Supreme Court, is directly on point and controls herein. *Yahn* is particularly applicable here because the discretionary determination by the Fund under 29 U.S.C. Sec. 1392(c) is even *broader* than those in 29 U.S.C. Sec. 2381 that were dealt with by the Third Circuit in that case.

Yahn is clearly on point and is distinguishable from the cited cases referred to in the Fund's brief. The court in *Yahn* dealt with many of those cited cases. Further, as I have noted above, the issue before us is not one which does fall within any special expertise the Fund's trustees may possess dealing with specialized actuarial assumptions.

Thus, after a review of the legislative history, the statute itself, the cited cases, and the controlling Third Circuit decision, the only result that can follow is that a de novo hearing is appropriate in order to determine whether in fact Fuqua was in violation of Section 1392 when it spun-off Interstate.

Further, the Fund's attempt to argue that the factual situation is analogous to Federal tax determinations is

not persuasive. Our case is governed by a specific statute ---MPPAA. It does not arise under nor is it governed by the provisions of the Tax Code. What is at issue is not a tax determination but one of withdrawal liability determination governed by MPPAA.

The Fund Bears the Burden of Proof.

The question before us as the District Court stated on referral "is a factual issue requiring evaluation of credibility"—i.e. determining whether Fuqua did or did not have as a "principal purpose" the evasion of liability for Interstate's obligation to the Fund.

The Fund does have the burden of persuasion that, more likely than not, its version of the facts is correct. But both parties in reality bear the burden of producing evidence to support their versions of the facts at issue. The critical burden referred to herein is that which both parties have to persuade the arbitrator concerning the ultimate truth of the facts at issue. The arbitrator notes that the company has recognized this in Point II of its initial brief stating: "Fuqua will demonstrate that the spin-off of Interstate was not intended to evade or avoid withdrawal liability."

This statement recognizes that the ruling on the Fund's burden in no way creates a presumption by the arbitrator that the company's view of the dispute is correct. That is the purpose of the de novo hearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1340

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY and CHARLES J. SCHAFFER, JR., Its Administrator and a Fiduciary

v.

FUQUA INDUSTRIES, INC.

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; CHARLES J. SCHAFFER, JR.,
Appellants

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, *Circuit Judges*, and SEITZ, *Senior Circuit Judge* *

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the

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* Judge Seitz voted only on panel rehearing.

decision having asked for rehearing, and a majority of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ [Illegible]
Circuit Judge

Dated: Dec. 3, 1992